Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

PAUL N. ISENBERGH, JR., and ERIC E. ISENBERGH,
as co-personal representatives of the
Estate of PAUL ISENBERGH

Petitioners,

vs.

KNIGHT-RIDDER NEWSPAPER SALES, INC., n/k/a
NEWSPAPERS FIRST, INC. and KNIGHT-RIDDER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Where an employment discrimination victim makes a *prima facie* case and then meets the employer's proffered explanation with evidence that an appeals court panel says in a published opinion,

One, raises questions that the given reason "may not have been completely truthful,"

Two, "makes the process seem somewhat suspect,"

Three, "casts. . .doubt on the selection process,"

Four, provides such grounds that "it would not have been mere speculation for the jury to disbelieve [the employer's] explanation for the selection process," and,

Five, prompts even the appeals court panel to declare that the employer's explanation "may have been a smoke screen,"

may the appeals court panel, in a revised opinion that confines to dicta its pretext-plus interpretation of *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), affirm a judgment as a matter of law in favor of the defendant on the basis that the employee "failed in creating an issue of fact about the disbelievability of the employer's reason for the hiring decision"?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no nonwholly owned subsidiary of either of the corporate respondents of which petitioners are aware. The Times-Mirror Co. is, upon information and belief, a one-third owner of Newspapers First, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Paul N. Isenbergh, Jr., and Eric E. Isenbergh, as co-personal representatives of the Estate of Paul Isenbergh,[1] respectfully petition for a writ of certiorari to

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[1] Paul Isenbergh, the plaintiff in this action, died subsequent to trial. Paul N. Isenbergh, Jr., and Eric E. Isenbergh, his sons, are substituted as the co-personal

review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 84 F.3d 1380 and 97 F.3d 436 (11th Cir. 1996) and are reproduced in the Appendix filed herewith ("App.") at 1a and 20a. The opinion of the district court is reported at 856 F.Supp. 1561 (S.D. Fla. 1995) and is reproduced at 36a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Eleventh Circuit was rendered on June 11, 1996. The Court of Appeals' second decision, on a petition for rehearing, was rendered on September 19, 1996.

The Court of Appeals panel's withdrawal of its original decision, and issuance of its second decision, September 19, 1996, mooted Isenbergh's first Suggestion of Rehearing En Banc on September 19, 1996. The Court of Appeals denied Isenbergh's Suggestion of Rehearing En Banc, directed to the second opinion, December 10, 1996.

The Court, through Mr. Justice Kennedy, on February 28, 1997, granted petitioners an extension of time until and including April 19, 1997, within which to file this petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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representatives of his estate.

STATUTE INVOLVED IN THIS CASE

The pertinent provision of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621, *et seq.* ("ADEA") is set forth below:

> § 623. Prohibition of Age Discrimination
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

STATEMENT OF THE CASE

Knight-Ridder Newspaper Sales, Inc. and Million Market Newspapers/Times Mirror National Marketing, Inc. merged their national advertising sales operations in 1990, forming Newspapers First, Inc. To manage the Miami office, Newspapers First, Inc. chose Million Market's man in Miami, Larry Malloy, who was then 44, over Paul Isenbergh, who was 60. A jury decided it was age, not qualifications, that made the

difference. The trial judge overturned the jury verdict. The Court of Appeals for the Eleventh Circuit at first affirmed the trial judge, discussing at some length the evidence upon which the panel said a jury could have based disbelief of Newspapers First's proffered reasons — but concluding that a reasonable jury still could not have found age discrimination. On rehearing, the same panel affirmed again, with no discussion of the evidence other than a passing reference to its having "failed in creating an issue of fact about the disbelievability of the employer's reason for the hiring decision."

Newspapers First asserted that its basis for the selection was a nationwide "alternation ranking" process that focused both on historical performance and presentation during a hotel-suite interview in New York City. Managers from throughout the nation were ranked as best, worst, second best, second worst, and so on, within their respective former companies, and were then separately ranked the same way on how they did in their interviews. Numerical scores were assigned to their positions.

Isenbergh's historical performance included:

- earning a vice presidency six years earlier, following 27 years with Knight-Ridder Newspaper Sales and its predecessors;

- wresting a major account (Walt Disney World) away from Malloy when the two were competitors;

- earning annual performance-based raises and regularly achieving bonuses of up to 80 per cent of his management-by-objective target.

- managing an office that serviced 28 Knight-Ridder, Inc. newspapers nationwide, six of them major-market papers (compared to Malloy's 12 big-city papers) and that produced more sales dollars than did Malloy's office.

The second ranked component of the selection process was an interview, scheduled for an hour per applicant. Isenbergh got a half hour, most of it with Newspapers First's new president (and the former president of Million Market Newspapers), Kingsley Anthony, speaking on the telephone to someone else. While Anthony conversed on the phone with whomever, John Kosanke, the executive vice president (and, like Isenbergh, a Knight-Ridder veteran), told Isenbergh that the new company would be a "much faster track" than either of them had been on before. Malloy got the full hour, during which both Anthony and Kosanke questioned him.

Anthony and Kosanke factored their subjective assessments of the two groups of managers into the alternation-ranking grid, adding together the performance scores and the interview scores, and dividing by two for a final score. Knight-Ridder, Inc.'s human resources vice president had suggested this method, although Knight-Ridder had never before used that tool. Even though the only job really at issue was that of the Miami office manager, and even though there were no plans to transfer managers from one city to another, Anthony and Kosanke included in their ranking managers from across the country. They scored Malloy relatively high, but not at the top, and Isenbergh relatively low, but not at the bottom. Malloy got the job.

After hearing testimony concerning the decision-making process, the relative qualifications of both candidates, and the manner in which the interviews were conducted, a jury found

that Newspapers First had engaged in intentional age discrimination in its selection of Malloy over Isenbergh, and awarded $250,000 in back pay. The trial court, Hon. Jacob Mishler, J., then sent back a Supplemental Jury Verdict, which asked: "Did the defendants have a good faith belief that Larry Malloy was better qualified than plaintiff Paul Isenbergh for the position of Miami office manager of Newspapers First?" The Jury answered "No."

The trial court, upon the renewed motion of the defendants, entered a judgment as a matter of law in the defendant's favor, pursuant to Federal Rule of Civil Procedure 50, stating what the trial court characterized as an "unnecessary" opinion that Isenbergh did not make out a *prima facie* case — unnecessary "because Isenbergh failed to prove that the reasons offered by Newspapers First for hiring Malloy over him were pretextual, and furthermore failed to demonstrate that he was the victim of discrimination based on his age." 856 F.Supp. at 1571-72 (App. at 55a)

> The Supreme Court has made absolutely clear that the burden of proof in an age discrimination case is at all times on the plaintiff to demonstrate that he was the victim of intentional discrimination based on his age. *Hicks*, 113 S.Ct. 2742 at 2747 (1993).[2] The plaintiff's burden goes beyond merely establishing that the reasons offered by the defendant for its action were not worthy of belief. More than this, the plaintiff must affirmatively prove by a preponderance of the evidence that discrimination did in fact occur. *Id.* at 2751.

---

[2] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

856 F.Supp. at 1567-68 (App. at 46a).

Isenbergh appealed the final judgment to the Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291. The appeals court panel, in its original decision,

One, determined that Isenbergh had made a *prima facie* case. 84 F.3d at 1387.

Two, observed that

> The alternation ranking system, by which Newspapers First evaluated managers from all around the country, may or may not have been a fair way to evaluate the candidates for the new job. *Looking at it in the light most favorable to Isenbergh, Newspapers First may not have been completely truthful in claiming that this somewhat objective criterion was used to evaluate the candidates.* Malloy did not rank first in the selection process, and the competition for the new job may effectively have been only between Malloy and Isenbergh, the two candidates from Miami, which makes the process appear somewhat suspect. *Isenbergh's testimony that his interview was shorter than planned and that Anthony talked on the phone during most of the time, if believed, casts further doubt on the selection process. It would not have been mere speculation for the jury to disbelieve Newspapers First's explanation of the selection process.* There is no evidence, however, that the real selection process used age as a criterion. A sixty-three-year-old candidate was rated more highly than Isenbergh overall, and more highly than both Malloy and Isenbergh in terms of managerial skills. Most likely, Kosanke and Anthony chose Malloy because they liked the way he had

> performed in the past. *The alternation ranking system may have been a smoke screen hiding the fact that Newspapers First held Malloy in higher regard than Isenbergh*, but there is no evidence from which a jury could reasonably believe that it was a smoke screen hiding the fact that Malloy was hired because of his relative youth.

84 F.3d at 1388 (App. at 34a) (emphasis supplied).

The panel affirmed the trial court, stating in the initial opinion that — the discrepancies in Newspapers First's explanation for its actions notwithstanding — there was "not sufficient evidence of intentional discrimination to allow Isenbergh's claim to be decided by the jury." *Id.*

On a petition for rehearing, the panel withdrew its earlier published opinion but still affirmed the trial court. 97 F.3d at 438 (App. at 35a). The panel once again concluded that Isenbergh had made out a *prima facie* case. 97 F.3d at 440 (App. at 7a). It held that, "Here, Newspapers First met its burden of production by asserting that Isenbergh was denied the managerial position because he was the less qualified of two applicants for the same job." 97 F.3d at 440 (App. at 9a) The panel then, following dicta in which it discussed essentially a pretext-plus interpretation of *Hicks,* parallel to that of the trial court, dispensed with the case at bar (without, as it had in its first published opinion, dealing with those elements of Newspapers First's case that even the panel conceded were susceptible to reasonable disbelief) by stating that "our examination of the record here indicates that Isenbergh failed in creating an issue of fact about the disbelievability of the employer's reason for the hiring decision." 97 F.3d at 443-444 (App. at 9a).

REASONS FOR GRANTING THE WRIT.

I.

Where an employment discrimination victim makes a *prima facie* case and then meets the employer's proffered explanation with evidence that an appeals court panel says in a published opinion,

***One*, raises questions that the given reason "may not have been completely truthful,"**

***Two*, "makes the process seem somewhat suspect,"**

***Three*, "casts. . .doubt on the selection process,"**

***Four*, provides such grounds that "it would not have been mere speculation for the jury to disbelieve [the employer's] explanation for the selection process," and,**

***Five*, prompts even the appeals court panel to declare that the employer's explanation "may have been a smoke screen,"**

the appeals court panel may not, in a revised opinion — even one that confines to dicta its pretext-plus interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) — affirm a judgment as a matter of law in favor of the defendant on the basis that the employee "failed in creating an issue of fact about the disbelievability of the employer's reason for the hiring decision."

The Court should grant the petition for a writ of certiorari and should issue the writ to establish clearly, within the context determining "the elusive factual question of

intentional discrimination," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, that it "meant what it said,"[3] when it stated in Burdine that "there may be some cases where the plaintiff's initial evidence, combined with effective cross examination, will suffice to discredit the defendant's explanation," 450 U.S. at 255, n. 10, and in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993) that

> [T]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, [footnote omitted] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*" [citation omitted] (emphasis added)....

509 U.S. at 511 (emphasis added in original).

While the *Isenbergh* panel in its second published opinion attempted to avoid a direct conflict with *Burdine* and *Hicks*, the record as a whole — i.e., the published district court opinion and the first appeals panel opinion, with its concessions as to the evidence of pretext that Isenbergh elicited — makes

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[3] In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 S.Ct. 163, 167 (1993), the Court noted succinctly that in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) "we said in effect that the Rule meant what it said..." on the subject of notice pleading, a concept that nonetheless remained elusive to some of the lower courts.

it clear that the lower tribunals in this case simply were unwilling to allow jurors to reject what the judges themselves accepted as an adequate explanation for the employment decision, even though there were flaws in that explanation, flaws upon which the jury seized in inferring discriminatory intent.

It is the appeals court's panel's listing in its first opinion of the holes in Newspapers First's version — offering as an explanation for the hiring decision the alternation-ranking procedure that "may not have been completely truthful" and that made "the process appear somewhat suspect" and engaging in an interview sequence that, were Isenbergh's version to be believed, "casts further doubt on the selection process" — that distinguishes the case at bar from one in which there simply is an insufficiency of evidence to show pretext. *Compare Woods v. Friction Materials, Inc.*, 30 F.3d 255, 262 (1st Cir. 1994) (plaintiff's only evidence of pretext concerning his failure-to-hire claims was his own opinion that he was better qualified than those hired, based on his experience).

The opinion of which petitioners seek review, if left to stand, would create at least the hope of a second-chance safe harbor for employers who cloak their discriminatory decisions in a colorable argument: even if the jury does not buy the employer's story, because of, for example, its internal inconsistencies, perhaps the judge will, as happened here. For judges, trial or appellate, to reweigh arguable evidence that has been evaluated reasonably by a jury, no matter how good those judges' intentions, violates a party's right to trial by jury. To do so in the way in which the appeals court panel did — i.e., in serial published opinions, one of which states that there is evidence to support a disbelief of the employer's explanation, but the second of which says that there is no such evidence — conjures up the specter of a results-oriented judiciary. That

would seem to be precisely the evil envisioned in this Court's prescription for certiorari review whenever a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's supervisory powers." Sup. Ct. R. 10(a).

The judgment of the Court of Appeals additionally added for Paul Isenbergh a pretext-plus factor — virtually a direct-evidence requirement — to the *Burdine/Hicks* paradigm. If allowed to stand as a model, the appeals court panel's second opinion sets, if not precedent,[4] at the very least bad example.[5] Its teaching vitiates employees' right to jury trials against employers who, in the jurors' minds, just are not telling the truth, and, in the jurors' minds, therefore, likely are discriminating. The panel decision no longer permits jurors to infer discriminatory intent from dissembling testimony. It requires plaintiffs to show something more. That simply is not

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[4] A subsequent panel of the Court of Appeals for the Eleventh Circuit recently excoriated the dicta in *Isenbergh* as misstating clearly-established circuit precedent. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

[5] A district court within the Eleventh Circuit has relied on it as "*holding* that a court may grant judgment as a matter of law for an employer even where the court disbelieves the employer's proffered reason for the adverse employment action, provided the employee has failed to affirmatively prove that discrimination motivated the adverse action." *Louis v. Encore Computer Corp.*, 949 F.Supp. 836, 842, n. 14 (S.D. Fla. 1996) (emphasis supplied).

the way that this Court, in *Burdine* and *Hicks*, said it should work.

Were the result in this case merely unjust, simply a single, badly done opinion, it would be one of those glitches in the system that might make lawyers and judges cringe, but that simply would not be of the magnitude to require the attention of the Supreme Court of the United States. The way in which the panel went about it, however, makes it clear that the panel decision of which petitioners seek review is not merely a random weed, but rather a mutant seed capable of growing much mischief. This appeals court judgment deserves this Court's attention, both to remedy its individual injustice and to prevent its spread.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED SEPTEMBER 19, 1996

United States Court of Appeals,

Eleventh Circuit.

No. 94-4769.

Paul ISENBERGH, Plaintiff-Appellant,

v.

KNIGHT-RIDDER NEWSPAPER SALES, INC., n.k.a. Newspapers First, Inc., Knight-Ridder, Inc., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida. (No. 91-1596-CIV-UUB), Jacob Mishler, District Judge.

Before EDMONDSON and DUBINA, Circuit Judges, and ENGEL*****, Senior Circuit Judge.

PER CURIAM:

We withdraw altogether our earlier opinion dated June 11, 1996, and published at 84 F.3d 1380. Our decision for the

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*****Honorable Albert J. Engel, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

case remains the same. We think today's opinion may in some ways better explain our thoughts, however.

Plaintiff Paul Isenbergh appeals the district court's grant of judgment as a matter of law for defendant Knight-Ridder Newspaper Sales, Inc. ("KRNS"), n/k/a Newspapers First, Inc. ("Newspapers First"), in Isenbergh's suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Isenbergh claims that Newspapers First discriminated against him because of his age in selecting the manager for the company's Miami sales office. After trial, a jury returned a verdict in favor of Isenbergh and awarded him $250,000 in damages. Newspapers First renewed its motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure; the district court granted the motion. Because we agree that Isenbergh did not produce evidence from which the jury could reasonably infer intentional discrimination based on age, we affirm.

I.

In 1990, KRNS merged with Million Market Newspapers/Times Mirror National Marketing, Inc. ("MMTM") to form Newspapers First. At the time of the merger, Isenbergh, sixty years old, was the manager of KRNS's Miami sales office. Larry Malloy, forty-four years old, was the manager of MMTM's Miami sales office. Both were candidates, along with eight other KRNS and MMTM managers from around the country, for the new position of manager of Newspapers First's Miami sales office. To select the new manager, King Anthony, the former president of MMTM and current president of Newspapers First, and John Kosanke, the former president of KRNS and current executive vice-president of Newspapers First, interviewed the ten candidates. The only real competition for the new position, however, was apparently between Isenbergh and Malloy,

because Newspapers First did not want to move a manager from another part of the country to Miami. In conjunction with the interviews, Anthony and Kosanke used an "alternation ranking system" to rate the candidates. KRNS had never used this system before to make personnel decisions. Under the system, each candidate received two ordinal rankings: one based on past management performance and one based on the interview. The two rankings were averaged to obtain each candidate's overall score.

When the nine candidates who had worked at KRNS or MMTM for more than six months were ranked according to this system, Isenbergh finished eighth. Malloy finished second. Three managers over age fifty–including one who was sixty-three years old–finished higher than Isenbergh. Malloy got the job, and Isenbergh was offered the chance to interview for a sales position in Miami. He chose to take early retirement instead.

Isenbergh testified that the atmosphere at his interview was "cold" and that Anthony was on the phone most of the time. His interview allegedly lasted only a half-hour, whereas Malloy's was a full hour, as all of the interviews were planned to be. Newspapers First presented evidence challenging Isenbergh's version of what happened at the interview.

Isenbergh worked for KRNS from the late 1960s until 1990, mostly as a salesman. He became a vice-president in 1984. In 1986, he won the praise of Kosanke by selling an advertising package to Walt Disney World. Isenbergh's competitors for the account included a newspaper whose sales were handled by Malloy. The parties dispute the significance of this transaction. Isenbergh characterizes it as evidence of his good job performance in the past and of his superior qualification, relative to Malloy, for the managerial job.

Newspapers First deems it to be irrelevant, because it involved sales, not management, and because Isenbergh's newspaper was able to offer Walt Disney World a lower advertising rate than was Malloy's newspaper.

There is conflicting evidence about how Isenbergh was viewed within the company and about his qualifications as a manager. Isenbergh points to his annual pay raises and management-by-objective bonuses that were approved by Kosanke, as well as to the lack of a paper trail of criticism, as evidence of his perceived competence. He further points to testimony by Kosanke that Isenbergh was a "seasoned manager" and a "satisfactory manager." Kosanke also testified, however, that Isenbergh was a "lone ranger" and was not a "team player." Isenbergh argues that his experience running newspaper offices of up to five people and commanding a department of about sixty men while he was in the Navy qualified him as a manager. Newspapers First counters that Isenbergh's job at KRNS entailed little management and that for the management Isenbergh did do, he was criticized by Kosanke. It stresses Malloy's extensive management experience and argues that he was better suited for the new job than Isenbergh.

II.

A.

We review de novo the district court's grant of judgment as a matter of law. *Daniel v. City of Tampa,* 38 F.3d 546, 549 (11th Cir.1994), *cert. denied,* --- U.S. ----, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995). In other words, we apply the same standard as that applied by the district court. *Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir.1989). In considering a motion for judgment as a matter of law, a court

must view all the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Id.* The motion should be granted only if upon such consideration, the court finds that reasonable people in the exercise of impartial judgment could not arrive at a contrary verdict. *Id.* The court may not weigh the evidence or decide the credibility of witnesses. *Watts v. Great Atl. & Pac. Tea Co.,* 842 F.2d 307, 310 (11th Cir.1988) (quoting *Boeing Co. v. Shipman,* 411 F.2d 365, 375 (5th Cir.1969) (en banc)). The nonmoving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law; "there must be a substantial conflict in evidence to support a jury question." *Carter,* 870 F.2d at 581.

We look first to see whether Isenbergh has presented a prima facie case of discrimination. A plaintiff alleging age discrimination under the ADEA may choose one of three ways to establish a prima facie case: (1) direct evidence of discriminatory intent; (2) statistical proof of disparate treatment; or (3) meeting a test such as that set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir.1989). Plaintiff's burden in proving a prima facie case is light. *See Brown v. American Honda Motor Co.,* 939 F.2d 946, 949 (11th Cir.1991).

In *McDonnell Douglas,* the Supreme Court articulated the four elements a plaintiff must show in order to establish a prima facie case of employment discrimination:

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer

> continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. The Supreme Court intended this framework to be flexible, *see id.* at 802 n. 13, 93 S.Ct. at 1824 n. 13, rather than "mechanized, or ritualistic," *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)). This court has enunciated various reformulations of the *McDonnell Douglas* test. For example, in *Earley v. Champion International Corp.,* 907 F.2d 1077 (11th Cir.1990), we set forth a slightly different variation of the *McDonnell Douglas* test in an ADEA case involving a "reduction in force." The plaintiff had to show

> (1) that he was in a protected age group and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue.

Earley, 907 F.2d at 1082.

The district court treated this case as a "failure to hire" case, as opposed to a "reduction in force" case. Although, as discussed above, case law suggests that the standard for establishing a prima facie case depends on whether the case concerns a reduction in force as opposed to a termination or a failure to hire, *compare Earley,* 907 F.2d at 1082 (listing prima facie case criteria for reduction-in-force cases), *with Carter,*

870 F.2d at 582 (listing prima facie case criteria for termination and failure-to-hire cases), the instant appeal demonstrates why, as we noted in *Pace v. Southern Railway System,* 701 F.2d 1383 (11th Cir.1983), employment discrimination cases are not easily categorized and why any prima facie case test must be flexible. In a sense, the position of manager of Newspapers First's Miami office was a new job as a result of the merger of KRNS and MMTM, and Isenbergh's and Malloy's previous positions disappeared. From this viewpoint, the case is one of a failure to hire. Because the candidates considered for this "new" position, however, were all from within the two merging companies, the situation was not the same as in a standard failure-to-hire case. In essence, because of the merger, there was a reduction in force from two Miami managers to one. In deciding whether Isenbergh has established a prima facie case, we need not crudely categorize the facts as involving either a failure to hire or a reduction in force. Instead, we examine the facts of the case and decide "whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." *Pace,* 701 F.2d at 1387.

We conclude that Isenbergh presented a prima facie case. Isenbergh was in the protected age group, and he was adversely affected by Newspapers First's decision to select Malloy, who is sixteen years younger than Isenbergh, as the new manager.[1] Moreover, because the decisionmakers for

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[1]That Malloy was also a member of the class of persons protected by the ADEA does not render insufficient Isenbergh's prima facie showing. *See O'Connor v. Consol. Coin Caterers Corp.,* --- U.S. ----, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

Newspapers First were familiar with Isenbergh's performance in his work for KRNS, we can infer from the fact that he was granted an interview that Isenbergh was at least at some level qualified for the new job. Without deciding the ultimate question of whether a jury could reasonably infer intentional discrimination, we believe that Isenbergh has satisfied this part of the *McDonnell Douglas- Burdine* burden-shifting analysis.

B.

1. Newspapers First's Burden of Proffering a Non-Discriminatory Rationale For the Challenged Decision

We next inquire whether Newspapers First has met its burden of producing evidence of a legitimate, nondiscriminatory reason for offering the job to Malloy rather than to Isenbergh. *See generally Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). This burden on the employer is one of production, not persuasion. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 510-11, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). If the burden is met, the *McDonnell Douglas* framework "drops out" of the case, leaving the jury to decide the ultimate question of whether the employer intentionally discriminated on the basis of age. *Hicks,* 509 U.S. at 511, 113 S.Ct. at 2749. Here, Newspapers First met its burden of production by asserting that Isenbergh was denied the managerial position because he was the less qualified of two applicants for the same job.

2. Isenbergh's Burden of Proving that Age Was the Real Reason For the Challenged Hiring Decision

Newspapers First having met its burden of production, it fell to Isenbergh to show that the employer's proffered reason

for the adverse employment decision was false and that discrimination was the real reason. *Id.* at 515, 113 S.Ct. at 2752. On this point, we worry that there is some conflict in the case law of this circuit. The conflict concerns whether a plaintiff in Isenbergh's position carries his burden of proof on discrimination just by showing a basis in the record for disbelief of the employer's reason. The origin of the conflict is the Supreme Court's opinion in *Hicks*.

Hicks involved alleged employment discrimination based on race. It decided a narrow question which arose from a bench trial. The *Hicks* Court held that the plaintiff was unentitled to judgment as a matter of law even though the trier of fact–a district judge–disbelieved the employer's proffered nondiscriminatory reason. The district judge did not believe the employer's reason for firing the plaintiff, but also did not think that the plaintiff had proved that race was the real reason for his discharge. The district court, therefore, entered judgment for the defendant employer. The Eighth Circuit reversed, deciding that the discrediting of the employer's proffered reason entitled the plaintiff to judgment as a matter of law. The Supreme Court in turn reversed the court of appeals and remanded the case for further proceedings consistent with its opinion, reinstating the judgment entered in favor of the defendant by the district court as the trier of fact. Because *Hicks* was a case that had been fully tried before a judge sitting as the trier of fact, *Hicks* decided nothing about either Rule 50 (judgment as a matter of law in actions tried by jury) or Rule 56 (summary judgment) in employment discrimination cases.

This case is about Rule 50. Isenbergh argues that never can an employer be entitled to a judgment as a matter of law in an employment discrimination case if the evidence is sufficient to allow the jury to disbelieve the employer's proffered reason

for the employment action. To support this argument, Isenbergh looks beyond the decision in *Hicks,* that is, its holding, and stresses some language lifted from the opinion in *Hicks:*

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may,* together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, *will permit* the trier of fact to infer the ultimate fact of intentional discrimination, ... [and] upon such rejection, "[n]o additional proof of discrimination is required,"....

Id. at 511, 113 S.Ct. at 2749 (quoting *Hicks v. St. Mary's Honor Center,* 970 F.2d 487, 493 (8th Cir.1992)) (emphasis added).

We do not see these sentences as giving force to Isenbergh's argument. The first sentence of this passage shows that disbelief of the employer's proffered reason may (and by implication, may not) be enough for a plaintiff to overcome an employer's motion for judgment as a matter of law. The second sentence is potentially more confusing in saying that rejection of the proffered reason "will permit" the inference of discrimination. But keeping in mind that the word "will" sometimes means "can" (for example, "can permit") or "capable of," (for example, "capable of permitting"), both sentences, when read together, at least strongly suggest that rejecting the employer's proffered reason is not *always* sufficient to allow a finding of discrimination, although *sometimes* "(particularly if disbelief is accompanied by a suspicion of mendacity)" it might be. The *Hicks* Court spoke in a similar way in the accompanying footnote:

> Contrary to the dissent's confusion-producing analysis, there is nothing whatever inconsistent between [the statement quoted above] and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," and (2) "it is not enough ... to *dis*believe the employer." Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

Id. at 511 n. 4, 113 S.Ct. at 2749 n. 4.

In the context of the *Hicks* decision and the whole opinion, we think the phrase "(as we say here)" probably means "(as we say in this case, that is, in the matter before us)": given the record in *Hicks,* itself, the rejection of defendant's proffered reasons was enough–in Mr. Hicks' case, no more proof was required–to have supported a finding of discrimination.

While the language from the *Hicks* opinion might be capable of being read in two or more ways, the most important thing to recall about *Hicks* is plain: the case before the Court was not about Rule 50, a jury trial, or a verdict for plaintiff. Thus, the Court was deciding nothing about a case that presents those circumstances.

Some confusion exists in the law of this circuit about whether *Hicks* always precludes judgments as a matter of law for employers whenever there is a plausible basis on which to disbelieve the employer's proffered reason for the employment decision in question. *Howard v. BP Oil Co.,* 32 F.3d 520, 527 (11th Cir.1994), for example, concluded that under *Hicks,* "the fact finder's rejection of defendant's proffered reasons is sufficient circumstantial evidence upon which to base a

judgment for the plaintiff."[2] *Howard* reversed a summary judgment for the defendant where the record provided a basis for the disbelief of the defendant's proffered explanation.

If *Howard* was purporting to set out a legal principle that had application beyond its own facts, *Howard* seems inconsistent in this regard with the holding in, at least, *Walker v. NationsBank*, 53 F.3d 1548 (11th Cir.1995), and with some of the language in *Batey v. Stone*, 24 F.3d 1330 (11th Cir.1994). *See NationsBank*, 53 F.3d at 1557-58 (accepting plaintiff's contention that defendant's proffered reasons were lies, and nonetheless affirming directed verdict for defendant); *Batey*, 24 F.3d at 1334 n. 12 (noting that after *Hicks*, focus in discrimination cases is no longer falsity of employer's explanation, but whether plaintiff has proved intentional discrimination).

We doubt that *Howard* 's words are supported by the reasoning of Justice Scalia's opinion for the Court in *Hicks*, and we believe that *Howard* is mistaken when it reads *Hicks* as controlling kinds of cases that were not before the Supreme Court in *Hicks*.[3] Again, *Hicks* only held that a judge may, after

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[2] *Howard* is not the court's only opinion that says this kind of thing. *Howard*, however, may possibly be the only case in which the facts before the court were such as to make the statement determinative of the outcome.

[3] While the *Howard* court referred to *St. Mary's Honor Center v. Hicks* in shortened form as "*St. Mary's*," we refer to the case as "*Hicks*" because that name is the more widely used shortened form of the case name and because Hicks is the name of the first non-governmental party.

a bench trial, disbelieve the employer's proffered reason for a hiring decision and yet still grant judgment to the employer. *Hicks,* 509 U.S. at 508-11, 113 S.Ct. at 2748-49. So, despite the *Hicks* language quoted above, we have no confidence that the *Hicks* decision dictates to circuit and district judges, or even was intended to suggest, that every time the evidentiary record in a case could support a jury's disbelief of the employer's explanation for the pertinent employment action, no court may grant a motion for judgment as a matter of law to the employer (or grant to an employer summary judgment) in an employment discrimination case. In our view, *Hicks,* taken as a whole, more likely supports a different conclusion: in such circumstances, the watchword would be not "every time," but "sometimes."

According to *Hicks,* cases will exist where certain facts are established at trial, among them facts supporting the "dis-believability" (put differently, the unbelievableness) of the employer's reasons for the challenged employment decision, and where nonetheless the application of the law to the facts established at trial will yield a decision by the factfinder for the employer. Accepting *Hicks* 's holding, we still also think there will be some cases in which the record, viewed in the light most favorable to the plaintiff, supports the dis-believability of the employer's reason; and yet the application of the law to the evidence demands a judgment for the employer as a matter of law.

Assume the following situation by way of example. A defendant sues, alleging he was terminated based on his membership in a protected class. The employer responds with a neutral reason for the hiring decision: the employee was terminated because he was late nine times. After a bench trial,

the judge finds, among other facts, that the defendant was late not nine, but seven times. Relying on *Hicks,* however, the judge determines that this case is one where the employer's reason should be disbelieved, but where application of discrimination law to the instant facts (including dis-believability) nonetheless supports a judgment for the employer. This result is the one specifically authorized by *Hicks. See* 509 U.S. at 508-11, 113 S.Ct. at 2748-49.

The issue in *Howard* and *NationsBank* and the issue alluded to in the original panel opinion here is essentially this one: might there be a case where the application of law to facts can proceed in a similar way, but at the summary judgment stage or for the purposes of judgment as a matter of law? To continue with the prior example, suppose the employer offers the nine-latenesses explanation, and the record in a jury trial shows that no reasonable jury could find but that the plaintiff was late only seven times. Assuming the employee made out a bare prima facie case and nothing else points to discrimination, may the employer–at least, sometimes–be entitled to a judgment as a matter of law even though the jury could (indeed, must) disbelieve the employer's stated reason? The *Howard* panel, reading *Hicks,* seems to say "no."

We suspect, however, that the answer is "yes"–that *NationsBank,* not *Howard,* is the more correct statement of the law. *Howard* 's understanding of *Hicks* would preclude a judgment as a matter of law in some cases where historically (pre-*Hicks*) such judgment was required. But the *Hicks* opinion says that trial courts and reviewing courts should not treat discrimination differently from other ultimate questions of fact. 509 U.S. at 523-25, 113 S.Ct. at 2756. So, we are skeptical that the Supreme Court intended to remove an entire category of cases from traditional consideration under Fed.R.Civ.P. 50 or 56. *See generally Earley v. Champion*

Intern. Corp., 907 F.2d 1077, 1080 (11th Cir.1990) ("The summary judgment standard mirrors the standard for a directed verdict under the Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.") (citations and internal quotation marks omitted); *see also Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.1996) (en banc) (concluding that when employer's reason is disbelieved, "we are convinced that ordinarily such verdicts [for plaintiffs] would be supported by sufficient evidence, but not always. The answer lies in our traditional sufficiency-of-the-evidence analysis").

We doubt the Supreme Court intended to command such a dramatic and hurtful-to-employers change in the law when the Court decided *Hicks:* a decision which did not contract, but expanded, the universe of discrimination cases where judgment for employers would be permissible. We believe the Supreme Court would not declare such an important new rule–the rule which *Howard* sees in *Hicks*–in a case in which the new rule plays no vital part in the decision. We think the Supreme Court would have set out such an important new rule–one that, in effect, partly nullifies two of the Federal Rules of Civil Procedure–conspicuously and plainly so that no Article III judge could miss it. Simply put, we fear that what *Howard* says about sufficient evidence is a mistake which was caused by extending possibly ambiguous language in *Hicks* to decide a case (*Howard*) that presented a question not decided in *Hicks.*

Having noted the ostensible[4] conflict in the circuit's law and having had our say about it, we return to the case before us now. Whatever significance Howard might have, *Howard* does not control this case because our examination of the record here indicates that Isenbergh failed in creating an issue of fact about the dis-believability of the employer's reason for the hiring decision.

C.

Newspapers First has produced evidence showing that the principal criterion used in determining who would get the job was management ability, as assessed at the interviews and by evaluating past performance. And, Isenbergh's efforts to produce a basis to contradict Newspapers First's nondiscriminatory justification do not suffice to create a jury question on the issue of pretext. So, even if *Howard* is and ought to be the law, and a plaintiff–by providing a basis to doubt the employer's justification–can bar his employer's

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[4]We say *ostensible* conflict because we observe that *Howard* is a summary judgment case and that *NationsBank* is a Rule 50 case. This difference may be important. We today do not mean to rule out the possibility that motions for judgment as a matter of law in cases which have been fully tried, including the cross-examination of witnesses, may be governed by some different principles than those governing the grant or denial of summary judgment. So, the words of the *NationsBank* opinion might be inconsistent with the words of the *Howard* opinion, yet the two decisions might not be conflicting.

obtaining a judgment as a matter of law, Isenbergh has still failed to do so in this case.

"[B]ecause the plaintiff bears the burden of establishing pretext [for discrimination], he must present "significantly probative' evidence on the issue to avoid summary judgment." *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir.1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) (discussing summary judgment standard)). "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830.

In the discrimination context, we have stated that "[it] bears repeating that a mere scintilla of evidence does not create a jury question." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989) (holding, in ADEA case, that defendant was due judgment as matter of law where plaintiff failed to cast sufficient doubt on defendant's proffered non-discriminatory rationale). And, in considering whether a plaintiff has presented a jury question on pretext, we have required that the plaintiff point to facts which, if true, would present a basis for the disbelief of the defendant's *overall* justification. That the plaintiff calls into question some assertions made by the defendant in support of defendant's justification is not enough. The plaintiff must call into question the veracity of the defendant's ultimate justification itself. *See Brown v. American Honda Motor Co.*, 939 F.2d 946, 952-54 (11th Cir.1991) (although plaintiff succeeded in contradicting some facts alleged by defendant, plaintiff presented no jury question because defendant's ultimate justification went essentially unchallenged).

Here, as noted above, Newspapers First's proffered rationale was that Isenbergh was the less qualified of the two applicants for the job. In support of this assertion, Newspapers First presented the jury with evidence to show that Malloy, Isenbergh's competitor, managed a larger office; that Isenbergh had difficulties agreeing to office budgets; that Malloy was perceived by the decisionmakers as more of a team player; that Malloy was near the top of the rankings under the alternation ranking system, while Isenbergh ranked second-to-last; and that Malloy had dealt with a larger number of major market newspapers than had Isenbergh. Also, the evidence showed that the favorable past ratings Isenbergh pointed to related to Isenbergh's *sales,* not *managerial,* experience.

In the light of the extensive evidence supporting Newspapers First's contention that it hired Malloy because it believed him the better-qualified applicant, Isenbergh's efforts to prove Newspapers First's justification a pretext for discrimination do not succeed in creating a jury question. Isenbergh points out that he had successfully competed for a sales account with Malloy in 1986, that he had consistently received raises, that the alternation ranking system had not always been used, and that his would-be employers appeared bored and disinterested during his interview. These things provide a basis on which to question some facts offered by Newspapers First in support of its decision; but they do not, in view of Defendant's overwhelming evidence, provide a basis for contradicting Newspapers First's ultimate justification: Malloy was more qualified. *See Brown v. American Honda Motor Co.,* 939 F.2d 946, 952-54 (11th Cir.1991) (although plaintiff presented evidence that defendant slighted the procedures set out in its manual, plaintiff failed to create sufficient basis to disbelieve defendant's ultimate reasons for selecting other applicant).

III.

Newspapers First argues that Isenbergh's failure to remain employed and thereby mitigate his damages cuts off any claim that he may have. In view of our ruling, we need not address this issue.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 11,1996.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 94-4769

PAUL ISENBERGH,
APPELLANT

v.

KNIGHT-RIDDER NEWSPAPER SALES, INCORPORATED, a/k/a Newspapers First, Inc., Knight-Ridder, Inc.,
APPELLEES

Appeal from the United States District Court for the Southern District of Florida

. (No. 91-1596-CIV-UUB), Jacob Mishler, Judge.

Before EDMONDSON and DUBINA, Circuit Judges, and ENGEL*****, Senior Circuit Judge.

ENGEL, Senior Circuit Judge:

*****Honorable Albert J. Engel, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Plaintiff Paul Isenbergh appeals the district court's grant of judgment as a matter of law for defendant Knight-Ridder Newspaper Sales, Inc. ("KRNS"), a/k/a Newspapers First, Inc. ("Newspapers First"), in Isenbergh's suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Isenbergh claims that Newspapers First discriminated against him because of his age in selecting the manager for the company's Miami sales office. After trial, a jury returned a verdict in favor of Isenbergh and awarded him $250,000 in damages. Newspapers First, which earlier had submitted a motion for judgment as a matter of law that the district court denied, renewed its motion under Rule 50(b) of the Federal Rules of Civil Procedure. The district court granted the motion. Because we agree that Isenbergh did not produce evidence from which the jury could reasonably infer intentional discrimination based on age, we affirm.

I.

In 1990, KRNS merged with Million Market Newspapers/Times Mirror National Marketing, Inc. ("MMTM") to form Newspapers First. At the time of the merger, Isenbergh, sixty years old, was the manager of KRNS's Miami sales office. Larry Malloy, forty-four years old, was the manager of MMTM's Miami sales office. Both were candidates, along with eight other KRNS and MMTM managers from around the country, for the new position of manager of Newspapers First's Miami sales office. To select the new manager, King Anthony, the former president of MMTM and current president of Newspapers First, and John Kosanke, the former president of KRNS and current executive vice-president of Newspapers First, interviewed the ten candidates. The only real competition for the new position, however, was apparently between Isenbergh and Malloy, because Newspapers First did not want to move a manager

from another part of the country to Miami. In conjunction with the interviews, Anthony and Kosanke used an "alternation ranking system" to rate the candidates. KRNS had never used this system before to make personnel decisions. Under the system, each candidate received two ordinal rankings: one based on past management performance and one based on the interview. The two rankings were averaged to obtain each candidate's overall score.

When the nine candidates who had worked at KRNS or MMTM for more than six months were ranked according to this system, Isenbergh finished eighth. Malloy finished second. Three managers over age fifty–including one who was sixty-three years old–finished higher than Isenbergh. Malloy got the job, and Isenbergh was offered the chance to interview for a sales position in Miami. He chose to take early retirement instead.

Isenbergh testified that the atmosphere at his interview was "cold" and that Anthony was on the phone most of the time. His interview allegedly lasted only a half-hour, whereas Malloy's was a full hour, as all of the interviews were planned to be. Newspapers First presented evidence challenging Isenbergh's version of what happened at the interview.

Isenbergh worked for KRNS from the late 1960s until 1990, mostly as a salesman. He became a vice-president in 1984. In 1986, he won the praise of Kosanke by selling an advertising package to Walt Disney World. Isenbergh's competitors for the account included a newspaper whose sales were handled by Malloy. The parties dispute the significance of this transaction. Isenbergh characterizes it as evidence of his good job performance in the past and of his superior qualification, relative to Malloy, for the managerial job. Newspapers First deems it to be irrelevant, because it involved

sales, not management, and because Isenbergh's newspaper was able to offer Walt Disney World a lower advertising rate than was Malloy's newspaper.

There is conflicting evidence about how Isenbergh was viewed within the company and about his qualifications as a manager. Isenbergh points to his annual pay raises and management-by-objective bonuses that were approved by Kosanke, as well as to the lack of a paper trail of criticism, as evidence of his perceived competence. He further points to testimony by Kosanke that Isenbergh was a "seasoned manager" and a "satisfactory manager." Kosanke also testified, however, that Isenbergh was a "lone ranger" and was not a "team player." Isenbergh argues that his experience running newspaper offices of up to five people and commanding a department of about sixty men while he was in the Navy qualified him as a manager. Newspapers First counters that Isenbergh's job at KRNS entailed little management and that for the management Isenbergh did do, he was criticized by Kosanke. It stresses Malloy's extensive management experience and argues that he was better suited for the new job than Isenbergh.

II.

A.

We review de novo the district court's grant of judgment as a matter of law. *Daniel v. City of Tampa,* 38 F.3d 546, 549 (11th Cir.1994), *cert. denied,* --- U.S. ----, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995). In other words, we apply the same standard as that applied by the district court. *Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir.1989). In considering a motion for judgment as a matter of law, a court must view all the evidence in the light most favorable to the

nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Id.* The motion should be granted only if upon such consideration, the court finds that reasonable people in the exercise of impartial judgment could not arrive at a contrary verdict. *Id.* The court may not weigh the evidence or decide the credibility of witnesses. *Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 310 (11th Cir.1988) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir.1969) (en banc)). The nonmoving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law; "there must be a substantial conflict in evidence to support a jury question." *Carter*, 870 F.2d at 581.

Newspapers First argues that judgment as a matter of law is appropriate in age discrimination cases more often than in other cases because in age discrimination cases juries tend to return verdicts based on sympathy rather than law. Certainly it is true that in some age discrimination cases, "sympathy for the plaintiff may present an overriding but impermissible factor in a jury verdict for plaintiff." *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 265 (6th Cir.1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1375, 94 L.Ed.2d 690 (1987). If there can be no reasonable dispute as to the facts of the case and the inferences to be drawn from them, judgment as a matter of law is of course applicable to prevent a jury verdict based purely on sympathy. The legal standard for when to grant judgment as a matter of law in age discrimination cases, however, is no different from that in other cases: whether reasonable people could arrive at a contrary verdict. In fact, this court has cautioned against taking employment discrimination cases away from the jury. *See Batey v. Stone*, 24 F.3d 1330, 1336 (11th Cir.1994) (noting that summary judgment is often inappropriate in employment discrimination cases because the factual inquiry involves an examination of motive and intent); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 921 (11th Cir.1993) (noting that summary judgment is "generally

unsuitable in Title VII cases in which the plaintiff has established a prima facie case").

The fact that the district court judge allowed the question of Newspapers First's liability to go to the jury before granting judgment as a matter of law does not affect our review of the judgment. Before the 1991 amendment to Rule 50, a Rule 50 motion before the verdict was a "motion for directed verdict," and a Rule 50 motion after the verdict was a "motion for judgment notwithstanding the verdict." Now, both are termed "motion for judgment as a matter of law." The Advisory Committee on Rules has explained that one reason for the change in terminology was to express "the common identity of the two motions made at different times in the proceeding." Fed.R.Civ.P. 50(a) advisory committee's note on 1991 amendment. Furthermore, our cases have acknowledged that the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict. *E.g., Lamb v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1187 (11th Cir.1993). The district court's grant of Newspapers First's motion for judgment as a matter of law after the jury verdict under Rule 50(b) was not inconsistent with its denial of Newspapers First's motion for judgment as a matter of law before the verdict under Rule 50(a).

As the Advisory Committee has explained,

> Often it appears to the court ... that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often

> wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence....

Fed.R.Civ.P. 50(b) advisory committee's note on 1991 amendment. The district court in this case took such a prudent course, which in no way affects our analysis of whether its grant of the motion after the verdict was correct.

B.

We look first to see whether Isenbergh has presented a prima facie case of discrimination. A plaintiff alleging age discrimination under the ADEA may choose one of three ways to establish a prima facie case: (1) direct evidence of discriminatory intent; (2) statistical proof of disparate treatment; or (3) meeting a test such as that set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir.1989).

In *McDonnell Douglas,* the Supreme Court articulated the four elements a plaintiff must show in order to establish a prima facie case of employment discrimination:

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. The Supreme Court intended this framework to be flexible, *see id.* at 802 n. 13, 93 S.Ct. at 1824 n. 13, rather than "mechanized,

or ritualistic," *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)). This court has enunciated various reformulations of the *McDonnell Douglas* test. For example, in *Carter,* we applied a variation of the *McDonnell Douglas* test requiring that a plaintiff show the following elements to establish a prima facie case under the ADEA:

> (1) that he is a member of the protected group; (2) that adverse employment action was taken against him, e.g. discharge, demotion, or failure to hire; (3) that he was replaced by a person outside the protected group; and (4) that he was qualified for the position for which he was rejected.

Carter, 870 F.2d at 582 (footnote omitted).[1] In *Carter,* the plaintiff had been fired and replaced by a younger employee. In *Earley v. Champion International Corp.,* 907 F.2d 1077 (11th Cir.1990), we set forth a slightly different variation of the *McDonnell Douglas* test in a case involving a "reduction in force." The plaintiff had to show

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[1] An ADEA plaintiff need not show that the person selected for the job was younger than 40, even though ADEA protection begins at that age. *See, e.g., Pace v. Southern Ry. Sys.,* 701 F.2d 1383, 1387 (11th Cir.) ("Because of the value of experience rarely are sixty-year-olds replaced by those under forty." (quoting *McCorstin v. United States Steel Corp.,* 621 F.2d 749, 754 (5th Cir.1980))), *cert. denied,* 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983).

> (1) that he was in a protected age group and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue.

Earley, 907 F.2d at 1082.

We have followed the Supreme Court's command that the application of any test for establishing a prima facie case be flexible. *E.g., Carter,* 870 F.2d at 582 n. 11; *see also Pace v. Southern Ry. Sys.,* 701 F.2d 1383, 1387 (11th Cir.) ("The particularly amorphous nature of age discrimination counsels against rigid application of a *McDonnell Douglas*[-type] test."), *cert. denied,* 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983). Noting the difficulty of tailoring the *McDonnell Douglas* test to a specific case, we have held that the essence of any prima facie case test is simply "whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." *Pace,* 701 F.2d at 1387. Any particular test that a court chooses to use in evaluating this question is merely a "tool" to facilitate this evaluation. *Id.*

The district court treated this case as a "failure to hire" case, as opposed to a "reduction in force" case. Although, as discussed above, case law suggests that the standard for establishing a prima facie case depends on whether the case concerns a reduction in force as opposed to a termination or a failure to hire, *compare Earley,* 907 F.2d at 1082 (listing prima facie case criteria for reduction-in-force cases), *with Carter,* 870 F.2d at 582 (listing prima facie case criteria for termination

and failure-to-hire cases), the instant appeal demonstrates why, as we noted in *Pace,* employment discrimination cases are not easily categorized and why any prima facie case test must be flexible. In a sense, the position of manager of Newspapers First's Miami office was a new job as a result of the merger of KRNS and MMTM, and Isenbergh's and Malloy's previous positions disappeared. From this viewpoint, the case is one of a failure to hire. Because the candidates considered for this "new" position, however, were all from within the two merging companies, the situation was not the same as in a standard failure-to-hire case. In essence; because of the merger, there was a reduction in force from two Miami managers to one. In deciding whether Isenbergh has established a prima facie case, we need not crudely categorize the facts as involving either a failure to hire or a reduction in force. Rather, we examine the facts of the case and decide "whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." *Pace,* 701 F.2d at 1387.

If Isenbergh has succeeded in presenting a prima facie case, we then examine whether Newspapers First has satisfied its burden of producing evidence that the hiring of Malloy over Isenbergh was based on some "legitimate, nondiscriminatory reason." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). This burden on the employer is one of production, not persuasion. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 510-11, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). If the burden is met, the *McDonnell Douglas* framework "drops out" of the case, leaving the jury to decide the ultimate question of whether the employer intentionally discriminated on the basis of age. *Hicks,* 509 U.S. at 510-11, 113 S.Ct. at 2749.

Hicks holds that the plaintiff must show not only that the employer's proffered reason for the adverse employment decision was false, but also that discrimination was the real reason. *Id.* at 515-17, 113 S.Ct. at 2752. In *Hicks,* a case involving alleged employment discrimination based on race, the Supreme Court held that the plaintiff was not entitled to judgment as a matter of law when the trier of fact disbelieved the employer's proffered nondiscriminatory reason. The district court, which was the trier of fact, did not believe the defendant's reason for firing the plaintiff but also did not think that the plaintiff had proved that race was the real reason for his discharge. The court therefore entered judgment for the defendant. The Eighth Circuit reversed, arguing that the discrediting of the defendant's proffered reason entitled the plaintiff to judgment as a matter of law. The Supreme Court in turn reversed the court of appeals and remanded the case for further proceedings consistent with its opinion, presumably reinstating the judgment entered in favor of the defendant by the district court as the trier of fact. We recognize that the effect of our decision is not to reinstate the verdict for the plaintiff entered by the jury as the trier of fact but rather to express our agreement with the trial court that as a matter of law discrimination was not shown. Nonetheless, we believe that *Hicks* is instructive here and persuades us that the district judge did not err in granting the Rule 50(b) motion.

Evidence allowing the trier of fact to discredit an employer's proffered reason for an adverse employment decision thus alone is not enough for a plaintiff to survive a motion for judgment as a matter of law. Isenbergh disputes this proposition, relying on the following language from *Hicks:*

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the

> elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, ... [and] upon such rejection, "[n]o additional proof of discrimination is required,"....

Id. at 510-11, 113 S.Ct. at 2749 (quoting *Hicks v. St. Mary's Honor Center,* 970 F.2d 487, 493 (8th Cir.1992) (appellate court decision in same case)). The first sentence of this passage shows that disbelief of the employer's proffered reason *may* be enough for a plaintiff to survive a motion for judgment as a matter of law. The second sentence is potentially confusing in saying that rejection of the proffered reason "will *permit*" the inference of discrimination. In the context of both sentences together, however, it is clear that rejecting the proffered reason is not *always* sufficient to show discrimination. The *Hicks* Court clarified this distinction in a footnote:

> Contrary to the dissent's confusion-producing analysis, there is nothing whatever inconsistent between [the statement quoted above] and our later statements that (1) the plaintiff must show "both that the reason was false, and that discrimination was the real reason," and (2) "it is not enough ... to *dis*believe the employer." Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

Id. at 511 n. 4, 113 S.Ct. at 2749 n. 4.

Therefore, under *Hicks,* a plaintiff must show both that the defendant's reason was false and that the real reason was discrimination. *Id.* at 511 n. 4, 515-17, 113 S.Ct. at 2749 n. 4,

2752. A finding that the defendant's reason was false is alone not enough; there must also be a finding of discrimination. The finding of discrimination may be inferred, though, from the disbelief. Evidence from which the jury may reasonably disbelieve the employer's proffered reason is not necessarily enough to support a verdict for the plaintiff; the jury also must be able to infer from this disbelief or from other evidence that the employer's actual reason was discrimination. *Id.* at 510-11 & n. 4, 113 S.Ct. at 2749 & n. 4. Therefore, if the evidence in this case reasonably allows both the inference that Newspapers First's alleged reason for the employment decision was false *and* the inference that the real reason was age discrimination, then we must let the jury verdict stand.

C.

We find that Isenbergh has presented a prima facie case. The circumstances surrounding the merger of the two companies and the way in which Malloy was selected for the new position suggest that the newly formed company might have wanted to avoid hiring employees of Isenbergh's age. Isenbergh was in the protected age group, and he was adversely affected by Newspapers First's decision to select Malloy, who is sixteen years younger than Isenbergh, as the new manager.[2] Moreover, because the decisionmakers for Newspapers First were familiar with Isenbergh's performance in his work for KRNS, we can infer from the fact that he was granted an

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[2]That Malloy was also a member of the class of persons protected by the ADEA does not render insufficient Isenbergh's prima facie showing. *See O'Connor v. Consol. Coin Caterers Corp.*, --- U.S. ----, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

interview that Isenbergh was at least at some level qualified for the new job. Without deciding the ultimate question of whether a jury could reasonably infer intentional discrimination, we believe that Isenbergh has satisfied this part of the *McDonnell Douglas-Burdine* burden-shifting analysis.

We next inquire whether Newspapers First has met its burden of producing evidence of a legitimate, nondiscriminatory reason for offering the job to Malloy rather than to Isenbergh. We find that it has done so. It has produced evidence showing that the principal criterion used in determining who would get the job was management ability, as assessed at the interviews and by evaluating past performance.

Finally, we examine whether Isenbergh has produced evidence that Newspapers First's proffered reason was false and that the real reason was age discrimination. Looking at all the evidence in the light most favorable to Isenbergh, and drawing all reasonable inferences in his favor, we find that even if a reasonable jury could have disbelieved Newspapers First's proffered reason for hiring Malloy, there was no evidence from which a reasonable inference could be drawn that age discrimination was the actual reason. We stress that this holding is not inconsistent with our conclusion that Isenbergh has presented a prima facie case of discrimination. *See Carter v. City of Miami,* 870 F.2d 578, 585 (11th Cir.1989) ("[T]he mere establishment of a prima facie case of discrimination ... does not alone establish a genuine issue of material fact sufficient to go to the jury.").

As discussed above, under *Hicks,* evidence based on which the employer's proffered reason may be disbelieved *may* be enough to permit the trier of fact to infer discrimination. In this case, however, it is not. Once the employer asserts a reason for the adverse employment decision, the case is in

equipoise, and the *McDonnell Douglas-Burdine* framework becomes irrelevant. *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1557 (11th Cir.1995). The plaintiff has the burden of proving discrimination, so if the case remains in equipoise, the plaintiff must lose as a matter of law. Disbelief of the employer's reason is enough to push the case beyond equipoise and support a judgment for the plaintiff only if the disbelief is coupled with a reasonable belief that discrimination was the true reason. In *Hicks,* the trier of fact (the district court) disbelieved the defendant's reason but did not believe that the plaintiff had proved discrimination, and therefore the plaintiff lost. In the case at bar, similarly, we find that there is no evidence from which a reasonable jury could have inferred the "ultimate fact of intentional discrimination." *See Hicks,* 509 U.S. at 511, 113 S.Ct. at 2749.

The alternation ranking system, by which Newspapers First evaluated managers from all around the country, may or may not have been a fair way to evaluate the candidates for the new job. Looking at it in the light most favorable to Isenbergh, Newspapers First may not have been completely truthful in claiming that this somewhat objective criterion was used to evaluate the candidates. Malloy did not rank first in the selection process, and the competition for the new job may effectively have been only between Malloy and Isenbergh, the two candidates from Miami, which makes the process appear somewhat suspect. Isenbergh's testimony that his interview was shorter than planned and that Anthony talked on the phone during most of the time, if believed, casts further doubt on the selection process. It would not have been mere speculation for the jury to disbelieve Newspapers First's explanation of the selection process. There is no evidence, however, that the real selection process used age as a criterion. A sixty-three-year-old candidate was rated more highly than Isenbergh overall, and more highly than both Malloy and Isenbergh in terms of

managerial skills. Most likely, Kosanke and Anthony chose Malloy because they liked the way he had performed in the past. The alternation ranking system may have been a smoke screen hiding the fact that Newspapers First held Malloy in higher regard than Isenbergh, but there is no evidence from which a jury could reasonably believe that it was a smoke screen hiding the fact that Malloy was hired because of his relative youth.

In sum, there was not sufficient evidence of intentional discrimination to allow Isenbergh's claim to be decided by the jury. Therefore, the district court was correct in granting Newspapers First's motion for judgment as a matter of law.

III.

Newspapers First argues that Isenbergh's failure to remain employed and thereby mitigate his damages cuts off any claim that he may have. In view of our ruling, we need not and do not address this issue.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C - MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 22, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(MIAMI DIVISION)

Case No. 91-1596-Civ
(Jacob Mishler)

PAUL ISENBERGH,

Plaintiff,

v.

KNIGHT-RIDDER NEWSPAPER SALES, INC., n/k/a NEWSPAPERS FIRST, INC. and KNIGHT-RIDDER, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER

Defendants move this court for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (b) based on (1) the plaintiff's failure to establish a prima facie case; and (2) insufficient evidence of a violation of the A.D.E.A. including a lack of evidence of pretext. For the foregoing reasons the

motion for judgment notwithstanding the verdict is GRANTED.[1]

Background

This litigation was born of the 1992 merger of Knight-Ridder Newspaper Sales (KRNS) and Million Market Newspapers/Times Mirror National Marketing, Inc. (MMTM), which resulted in the emergence of a new entity known as Newspapers First, Inc. ("Newspapers First"). The merger's resulting reduction in force pitted Paul Isenbergh, 60, against Larry Malloy, 44, as contenders for the position of Manager of the Miami office of Newspapers First. Isenbergh had been the manager of the Miami office of KRNS for a number of years, and had worked for KRNS since the late sixties, when it took over the Philadelphia Inquirer, Isenbergh's previous employer. Malloy had worked in the newspaper advertising business for several years prior to his employment with MMTM as manager of the Miami branch office, which employment spanned approximately eight years prior to the merger of KRNS and MMTM. Following Malloy's appointment as manager, Isenbergh instituted this suite alleging violations of the Age Discrimination in Employment Act, ("A.D.E.A."), 29 U.S.C. § 621 *et seq.*

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[1] Defendants moved for a directed verdict at the time the plaintiff rested (Tr. 219) and again at the end of the entire case (Tr. 394), thereby satisfying the requirement set forth in *Redd v. City of Phoenix City, Ala.*, 934 F.2d 1211, 1214 (11th Cir. 1991) that a motion for directed verdict be made at the close of all the evidence in order to preserve the right to judgment notwithstanding the verdict.

On June 3, 1992 this court (Ryskamp, J.) issued an order granting partial summary judgment for defendants on Isenbergh's claim that he had been constructively discharged. A subsequent order was entered on May 21, 1993 (Ungaro-Benages, J.) in response to a defense motion urging that all recovery under the A.D.E.A. was precluded in the absence of a constructive discharge. The order denied summary judgment on the grounds submitted, leaving for trial the failure to hire theory, i.e., plaintiff was free to prove at trial that Newspapers First's failure to hire Isenbergh for the managerial position in Miami constituted a violation of the A.D.E.A.[2]

The case was tried before a jury from March 4, 1994 to March 10, 1994. A verdict was returned on March 10 in favor of the plaintiff which awarded $ 250,000 in damages to compensate the loss Isenbergh suffered as a result of Malloy's being hired instead of him. A supplemental verdict form was given to the jury inquiring as to whether the jury believed Newspapers First had a good faith belief that Malloy was more qualified for the position of manager than was Isenbergh. The jury responded in the negative. The defendants now move this court for judgment as a matter of law which we presently grant.

Discussion

I. THE RULE 50 (b) STANDARD

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[2] After colloquy occurred on March 7, 1994 between the attorneys and the court concerning the effect of the prior orders, the court's intention to treat the remainder of the case as a failure to hire case was made clear. Plaintiff's complaint was amended to explicitly allege the failure to hire theory, and the jury was charged solely on the failure to hire theory.

The standard to be utilized in setting aside a verdict and granting judgment as a matter of law has been enunciated by the Eleventh Circuit on numerous occasions. E.g., *Lamb by Shepard v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1187 (11th Cir. 1993); *Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525, 1528 (11th Cir. 1989). This circuit's standard was initially set out by the Fifth Circuit, prior to the creation of the Eleventh Circuit, [3] when that court decided the often-cited *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). In *Boeing* the Fifth Circuit said the following: On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case-- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Id.* at 374 - 375 (emphasis added).

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[3] The decisions of the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to close of business on that date, are binding as precedent on all federal courts within the Eleventh Circuit. *Bonner v. City of Prichard*, Ala., 661 F.2d 1206 (11th Cir. 1981).

There is no doubt that all inferences must be drawn in the light most favorable to the non-movant for the purposes of deciding the motion. *Bauer Lamp Co., Inc. v. Shaffer*, 941 F.2d 1165, 1169 (11th Cir. 1991); *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). However, there is also no doubt left in this circuit that "motions for . . . . judgment notwithstanding the verdict need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather there must be a substantial conflict in evidence to support a jury question." *Id.* "It bears repeating that a mere scintilla of evidence does not create a jury question." *Id.* Accord, *Neely v. Delta Brick & Tile Co. Inc.*, 817 F.2d 1224, 1225 (5th Cir. 1987) ("The en banc decision in Boeing overruled Planters in our circuit, and the scintilla rule is not our rule.")

II. THE LAW OF AGE DISCRIMINATION

When suing under the A.D.E.A. a plaintiff may take one of three avenues to prove his case. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077 (11th Cir. 1990). He can attempt to demonstrate discrimination by direct evidence, by statistical proof, or by establishing the elements of a prima facie case through circumstantial evidence as discussed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). This case involves only the third method of proof. The plaintiff presented no statistical evidence at trial and stipulated prior to trial that he had no direct evidence [4] that the

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[4] "Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) (citing *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989)) (emphasis added by Earley).

defendant's decisions were motivated by age factors. (Order of Ryskamp, J. of June 3, 1992, at 7).

The elements of a prima facie case as set forth in *McDonnell Douglas* are (1) that the plaintiff is a member of the protected class; (2) that the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications the plaintiff was rejected; and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. The Eleventh Circuit has utilized this standard in determining the existence of a prima facie case in the failure to hire context. *Welborn v. Reynolds Metals Co.*, 810 F.2d 1026 (11th Cir. 1987). [5]

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[5] While the Eleventh Circuit has not done so, some courts have made modifications to the *McDonnell Douglas* test to accommodate the plaintiff who asserts a failure to hire theory of discrimination. For example, in *Autry v. North Carolina Dep't of Human Resources*, 820 F.2d 1384 (4th Cir. 1987), the Fourth Circuit reasoned that it is by definition impossible to satisfy the fourth prong of *McDonnell Douglas* in a failure to hire context. Where an individual is refused a job for discriminatory reasons and the job is subsequently filled by a person who is not a member of the protected class, the position does not remain open and the employer does not continue to seek applicants from persons of the rejected party's qualifications. *Autry*, 820 F.2d at 1386 (4th Cir. 1987). Thus, a modified version of *McDonnell-Douglas* which does not require satisfaction of the fourth prong was adopted by the Fourth Circuit for failure to hire cases. The modification is not designed to give plaintiffs a free ride, however, and is not without admonition. The plaintiff must show a connection

Useful as it may be, the *McDonnell Douglas* formulation is "not the alpha and omega of possible tests in the age discrimination context." *Pace v. Southern Ry. System*, 701 F.2d 1383, 1387 (11th Cir. 1983) (citing *McCorstin v. United States Steel*, 621 F.2d 749, 753 (5th Cir. 1980)), cert. denied, 464 U.S. 1018 (1983). The Supreme Court has pointed out that since the facts vary from one discrimination case to another, the *McDonnell-Douglas* framework does not necessarily apply to all cases. *McDonnell Douglas*, 411 U.S. at 802, n.13. In recognition of this, several variations of the *McDonnell-Douglas* test have been adopted by the Eleventh Circuit. [6]

One such variation requires the plaintiff to demonstrate "(1) he was in a protected age group and was adversely affected by an employment decision, (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion, and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue." *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1500

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between the discrimination and the protected characteristic. "In other words, [the plaintiff] would have to show that [he] was not promoted because of [his age], not that [he] was a member of [the protected class] and not promoted." *Autry*, 820 F.2d at 1386 (4th Cir. 1987).

[6] Like the Supreme Court, the Eleventh Circuit has also acknowledged the need for flexibility in discrimination cases. "In this Circuit we have 'repeatedly eschewed . . . an overly strict formulation of the elements of a prima facie case, especially in age discrimination cases.'" *Alphin v. Sears Roebuck & Co.*, 940 F.2d 1497, 1500 (11th Cir. 1991).

(11th Cir. 1991) (discharged employee alleging age discrimination where there was no reduction in work force occurring); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077 (11th Cir. 1990) (same standard as set forth in *Alphin* utilized in the reduction in force context). The requirements for a prima facie case of discrimination in this circuit were set forth a little differently in *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) [7] where the Eleventh Circuit stated:

This Circuit has adopted a variation of the four-pronged test set out for Title VII claims in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), [**11] that allows a plaintiff to establish a prima facie case under the ADEA with circumstantial evidence by proving: (1) that he is a member of the protected group' (2) that adverse employment action was taken against him, e.g. discharge, demotion, or failure to hire; (3) that he was replaced by a person outside the protected group; and (4) that he was qualified for the position for which he was rejected. (Citations omitted, emphasis added).[8]

In utilizing this standard, the Eleventh Circuit has held that the requirement that the plaintiff be overlooked in favor of an individual who is not a member of the protected class is flexible in an age discrimination case because the protected class is part of a continuum rather than an entity that exists as

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[7] This case involved neither failure to hire nor reduction in force.

[8] This standard is identical to the one set forth in *Cuddy v. Carmen*, 762 F.2d 119 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985), which was cited in the briefs of both parties.

a discrete group. *Id.* at 583. In a case brought pursuant to the A.D.E.A., the plaintiff may satisfy the requirement that he was rejected in favor of one not in the protected class by "showing that a plaintiff 'was replaced by a substantially younger employee with equal or inferior qualifications' (emphasis in original)." *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1988). [9]

We do not attempt to adopt one formulation of the prima facie case standard over another as definitive in deciding this case. "The particularly amorphous nature of age discrimination counsels against rigid application of a [specific] test." *Pace v. Southern Ry. System*, 701 F.2d at 1387. This, however, does not leave us without a standard by which to determine the substance of the defendant's motion. Our determination will "turn[] on whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." *Id.* (citing *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 370 (5th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735 (5th Cir. 1977). This is consistent with the teaching of the Supreme Court in *St. Mary's Honor Center v.*

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[9] "The conclusion that replacement by a younger person will support a prima facie case was founded in part on a Department of Labor (DOL) interpretive rule in which the DOL concludes that replacement of a protected employee by one also within the protected group does not preclude a finding of a prima facie case of discrimination." *Pace v. Southern Ry. System*, 701 F.2d 1383, 1389, (11th Cir. 1983) (citing 49 C.F.R. § 860.91), cert. denied, 464 U.S. 1018, 78 L. Ed. 2d 724, 104 S. Ct. 549 (1983).

Hicks, 125 L. Ed. 2d 407, 61 U.S.L.W. 4782, 113 S. Ct. 2742 (1993) as well as being in line with Eleventh Circuit precedent.

Typically, after it is established that the plaintiff has demonstrated a prima facie case, a presumption of discrimination arises, and the burden of production shifts to the defendant to offer a legitimate, non-discriminatory motive for the action it took in denying employment to the plaintiff. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). This burden is one of production, not of persuasion. *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407, 61 U.S.L.W. 4782, 113 S. Ct. 2742 (1993); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991), cert. denied, 117 L. Ed. 2d 106, 60 U.S.L.W. 3498, 112 S. Ct. 935 (1992) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). "The purpose of placing this burden on the defendant is 'simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.'" *Cuddy v. Carmen*, 246 U.S. App. D.C. 25, 762 F.2d 119, 123 (D.C. Cir.), cert. denied, 474 U.S. 1034, 88 L. Ed. 2d 576, 106 S. Ct. 597 (1985) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). Once the defendant has proffered a legitimate, non-discriminatory motive for its actions, the burden of production then shifts back to the plaintiff to demonstrate that the reason offered by the defendant was pretextual. *Carter*, 870 F.2d at 584. "The Supreme Court teaches that 'a reason cannot be proved to be a "pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason.'" *Gallo v. Prudential Residential Services, limited partnership*, , No. 93-7556, slip op. at 3672 (2d Cir. April 27, 1994) (citing *St.*

Mary's Honor Ctr. v. Hicks, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2752 (1993)) (emphasis in *Hicks*).

The Supreme Court has made absolutely clear that the burden of proof in an age discrimination case is at all times on the plaintiff to demonstrate that he was the victim of intentional discrimination based on his age. *Hicks*, 125 L. Ed. 2d 407, 113 S. Ct. 2742 at 2747 (1993). The plaintiff's burden goes beyond merely establishing that the reasons offered by the defendant for its action were not worthy of belief. More than this, the plaintiff must affirmatively prove by a preponderance of the evidence that discrimination did in fact occur. *Id.* at 2751.

If the defendant offers a legitimate non-discriminatory motive for the action it took, the presumption of discrimination that arose from the plaintiff's prima facie case drops out and "the trier of fact must determine whether the plaintiff has met the ultimate burden of showing the employer intentionally discriminated against him in violation of the ADEA." *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983), cert. denied, 466 U.S. 929, 80 L. Ed. 2d 185, 104 S. Ct. 1712 (1984) (affirming the District Court's grant of judgment notwithstanding the verdict for failure to demonstrate pretext). In the absence of a presumption of discrimination, the question left to this court in determining defendant's Rule 50 motion is "whether the plaintiff's proof constituted evidence substantial enough to raise an inference of discrimination." *Id.* at 1001. In order for the jury's verdict to stand, the evidence must demonstrate that it was probable that Newspapers First acted pursuant to discriminatory motives; a mere possibility will not suffice. *Autry v. North Carolina Dep't of Human Resources*, 820 F.2d 1384 (4th Cir. 1987). "The factfinder must not be permitted to engage in surmise and conjecture," *id.*, and the purpose of Rule 50 is to ensure that it does not.

We find that in this case the jury did indeed engage in surmise and conjecture when it found that Newspapers First discriminated against Isenbergh on the basis of his age. After reviewing the evidence presented at trial, we conclude that not only did the plaintiff fail to carry its burden of proving discrimination under *Hicks*, he also failed to meet the lower hurdle of demonstrating defendant's offered reasons for the decision to hire Malloy were not credible.

III. THE EVIDENCE ADDUCED AT TRIAL

The Qualifications of Isenbergh and Malloy

Paul Isenbergh worked for KRNS from the time it took over the Philadelphia Inquirer in 1968 or 1969. (T. 54). He had opened the Miami office for the Philadelphia Inquirer after being promoted from his previous position in New York. (T. 54). Isenbergh was made a vice president of KRNS in 1984. (T. 55).

In 1986, prior to the merger between KRNS and MMTM, Isenbergh had the opportunity to become familiar with Larry Malloy while competing for Walt Disney World business in Detroit, (T. 57), a competition which Isenbergh won. (T. 60-61). There was evidence that one of the most significant factors motivating Disney to go with Isenbergh's paper over Malloy's was the cheaper rate Isenbergh was able to offer on behalf of his client. (T. 295). Regardless of how the Disney account was won, Isenbergh received the praise of his superiors at KRNS, (T. 60-62, 66), as well as recognition from the Detroit Free Press, the paper for which the advertisements were sold. (T. 64).

The office Isenbergh managed in Miami consisted of himself, a salesman by the name of Robert Govin, and one

secretary. (T. 81). The office had consisted at one time of five people, but had decreased in size during the seventies and eighties. (T. 81). Isenbergh's duties included the servicing of certain accounts in a sales capacity as well as preparing monthly reports and memoranda. (T. 74). Beyond participating in occasional conference calls and preparing the monthly reports, with which he was assisted by both Govin and the secretary, Isenbergh's duties were principally sales related. (T. 292). Isenbergh received a raise every year for thirty-three years. (T.66).

Larry Malloy, Paul Isenbergh's competitor for the managerial position, had started working for Million Markets in 1982 prior to its merger with Times Mirror. (T. 94). Prior to that he had worked as the national advertising manager of the Philadelphia Bulletin where he managed a staff of thirty-four sales people and seven clerical workers. (T. 106). In 1982 he went to Florida to open a branch office for Million Market Newspapers as their sole representative in that office. (T. 110) In 1983 he hired a sales representative to work for him (T. 111), and in 1985 when Million Market merged with Times Mirror, an additional sales person was added to the Miami office. Paul Isenbergh, the plaintiff in this action, had recommended Larry Malloy take over as President of the Newspaper Advertising Sales Association when he stepped down from that post. (T. 82, 126).

The Interviews

In 1992 it became apparent that KRNS and MMTM were going to merge. The managers were told that they had to go to New York to interview for their positions. (T. 56, 123). Both Paul Isenbergh and Larry Malloy were interviewed by John Kosanke, the former president of KRNS and the executive vice president of Newspapers First and also by Kingsley

Anthony, the president of Newspapers First who had come from the MMTM side before the merger. (T. 56, 123).

Viewing the evidence in the light most favorable to Isenbergh, his interview lasted only th questions. (T.70). One point Kosanke and Anthony discussed at Isenbergh's interview was the faster pace Newspapers First would be working at than what Isenbergh was used to at KRNS. (T. 71). Before KRNS and MMTM merged, KRNS represented twenty-eight newspapers nationwide and MMTM represented twelve. (T. 71). MMTM was responsible for eleven major market newspapers (T.296) and KRNS handled six major papers (T. 295).

Isenbergh felt he had come across as enthusiastic at the interview. (T. 71). He discussed what the new company would do and incentives that could be developed for increasing business. (T. 71). He also discussed increased sales incentives for managers, a topic not raised by any other interviewee. (T. 349). Isenbergh also raised issues relating to the creditworthiness of certain advertisers. (T. 349).

There was uncontradicted testimony that Isenbergh returned from the interview with positive feelings. Bob Govin, a personal friend of Isenbergh, testified that Isenbergh was "quite upbeat about it and felt that the interview went quite well in New York." (T. 299). He never told Govin that he felt he had been treated unfairly because of his age. (T. 300). Govin testified that prior to the merger between KRNS and MMTM both Isenbergh and Malloy enjoyed fine reputations. (T.299-300). Kosanke testified, however, that Isenbergh exhibited "no real excitement - nothing really to sell himself that he was the person to be the Miami manager." (T. 349). Anthony shared Kosanke's views on Isenbergh's lack of enthusiasm. (T. 249 - 253).

After interviewing Malloy, both Anthony and Kosanke were impressed by Malloy's managerial experience as well as his sales experience. (T. 346). They observed that Malloy was excited about the new opportunities the merger would present, sitting at the edge of the sofa throughout the interview. (T. 346). Kosanke recalled Malloy telling him that his general philosophy was "to sell the most each day." (T. 346). Malloy made it clear both that he wanted the job and that he was well qualified for it. (T. 248).

The Selection Process

Since Anthony did not know any of the KRNS people and Kosanke did not know any of the MMTM people prior to the interviews, Kosanke ranked his managers and Anthony ranked his on the basis of relative managerial skills in anticipation of the interview process. (T. 237). When Kosanke evaluated the seven managers (T. 322) of the various regions throughout the country relative to one another's managerial skills, Kosanke ranked Isenbergh next to last. (T. 331). At least one manager over the age of sixty, Mr. Watkins, was ranked higher than Isenbergh. (T. 335). Anthony's ranking of the three MMTM managers established the oldest of the three managers at MMTM as the best, and the youngest as the worst. (T. 238). At the time these rankings were tabulated, Kosanke was just shy of his sixtieth birthday, (T. 335), Anthony was fifty-five (T. 188) and the plaintiff was sixty years of age. (T. 57).

One of the reasons offered by Kosanke for ranking Isenbergh second to last was that he did not perceive Isenbergh to be a team player. (T.331). Kosanke offered the discussions of the lease on the Miami office as an example. (T.332). When the lease expired on the office some time in 1988, Kosanke did not want to ccmmit to any particular office space because he knew a merger with MMTM was possible and

he was not yet familiar with what the needs of the new Miami division would be. (T. 332). He suggested that Isenbergh contact the landlord and work out an extension, which Isenbergh did for a period of approximately four or five months. (T. 332). However, Isenbergh eventually told Kosanke that he had been advised by the landlord that they had thirty days to vacate the premises because the landlord had found a new tenant. (T. 332). When Kosanke contacted the landlord directly, he was advised that there was no new tenant, and KRNS could stay on until a new tenant was found. (T. 334).

Kosanke also encountered difficulty in dealing with Isenbergh regarding the Miami office's budget. While the budget for Miami was always ultimately approved, "every year was a battle". (T. 315). Kosanke characterized Isenbergh as a "lone ranger" type of manager interested only in his piece of business rather than the overall whole of the company. (T. 317). Isenbergh received credit toward his management by objective bonus for bringing his office in under budget, which he always did. (T. 316).

During his testimony, Kosanke also talked about the employee of the month program and the difficulties he had encountered with Isenbergh in relation to it. (T. 319). Kosanke did not want the program to create tension between the salesmen and the managers. In order to avoid allegations by a salesman that the manager did not push hard enough for him to win the award, Kosanke instituted a limitation on the recommendation a manager could make on behalf of a member of his staff. (T. 319). The manager was constrained to completing a form which contained only a line and a half for comment. (T. 320). While other managers limited themselves to the space provided, Isenbergh would usually send a one or two page note to Kosanke lobbying in favor of his salesman. (T. 320).

Like Isenbergh, Malloy too had been criticized by his superiors, only to a much lesser degree. Although Anthony classified the criticism as "not terribly significant," (T. 243) Malloy's difficulty with delegation was recorded in his personnel evaluations.

Following the interviews of all the managers, Kosanke and Anthony collectively created a ranking of the interviewees. (T. 237). An alternation ranking system was used, which means that the best candidate for a position is selected, then the worst. The person doing the evaluation then chooses the best and worst of the remaining candidates and the process continues until all of the candidates are placed in a rank. This ranking placed Malloy third or fourth and Isenbergh next to last. (T. 253). Anthony and Kosanke then discussed the rankings they had made of their own people, and combined the two parts to come up with a new ranking from most qualified to least qualified. (T. 237).

KRNS has never relied solely on an alternation ranking system before in making personnel decisions, however it had been used as an aid in making personnel decisions as well as in management development. (T. 160, 175). Alternation ranking was not used to make personnel decisions at Knight Ridder, Inc. between 1989 and the time of the merger of KRNS and MMTM. (T. 172). Decisions to move an employee up through the ranks at KRNS were made based on past performance. (T. 162). There is neither an official set of criteria nor a formalized objective program utilized to make decisions regarding an employee's advancement within the company. (T. 169-170).

One of the strengths of alternation ranking is that "if you [sic] identify the dimension that you [sic] are rating people on, you [sic] can quickly sort out the highs and the lows . . . ."

(T. 160). The dimensions being evaluated were set forth in a document entitled "Procedures for the Selection of Managers" which was prepared from notes taken by Robert Termotto, the C.F.O. of Newspapers First at a meeting in Baltimore. (T. 177). The document was drafted after Termotto met with Kosanke, Anthony and Mary Jean Connors, Vice President of human resources for Knight Ridder, Inc., KRNS's parent company. (T. 179) The guidelines set forth in the document included the candidate's long term potential for advancement to a larger office responsibility and/or promotion to senior management as one of the criteria to be considered in selecting a manager. (Plaintiff's Trial Exhibit 57). Another factor to be considered was the "potential value of local territory understanding and experience." (Plaintiff's Trial Exhibit 57). Neither of these two areas were explored with Isenbergh during his interview with Anthony and Kosanke. (T. 261-262).

Prior to the meeting, Termotto had never used alternation ranking. (T. 181). The criteria eventually established by Mr. Termotto resulted at least in part from discussions with Kosanke and Anthony, (T. 182); however, Termotto does not recall exactly how he came up with the criteria he suggested. (T. 182). Termotto did not consult with anyone at MMTM, KRNS or Knight Ridder, Inc. regarding Equal Employment Opportunity issues during the process of formulating the selection criteria. (T. 184).

Anthony testified that the outline for selection was suggested by Mary Jean Connors, (T. 200); however, Connors testified that her department does not recommend alternation ranking as a general practice. (T. 172). Robert Termotto did not recall Connors making any specific contributions to the selection criteria. (T. 179). Although Termotto recalled discussing the selection criteria with Kosanke and Anthony, he did not recall discussing them with anyone else (T. 182).

The Human Resources Office at Knight-Ridder; Inc. was aware that decisions regarding the managerial positions of Newspapers First would be filled at least partially in accordance with an alternation ranking system, since the ranking forms were obtained from that office. (T. 174). While it was the Human Resources Department that was responsible for monitoring compliance with equal employment opportunity requirements, no one from Knight Ridder's corporate human resources department participated in the evaluation of managers in any way following the merger of KRNS and MMTM. (T. 174).

The Outcome

After interviewing Malloy, Isenbergh and the other managerial candidates, Malloy was selected for the manager's position in Miami. Isenbergh was offered an opportunity to interview for one of the sales positions in the Miami office, but he refused to do so, indicating that his doctors had advised him the situation was too stressful for him. [10] (T. 76, 129). Isenbergh ultimately decided to retire. (T. 83).

IV. APPLYING THE FACTS TO THE LAW

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[10] At this point we also take notice of the efforts made by plaintiff's counsel to speed this case to trial in light of the deteriorating health of the plaintiff. This lends additional support to the conclusion of this court that Isenbergh voluntarily chose to retire in light of his poor health and the limitations that resulted therefrom rather than being terminated as the result of illegal discrimination.

The first question with which we are presented is whether Isenbergh established a prima facie case. The answer to this question is unnecessary to the disposition of this motion, because Isenbergh failed to prove that the reasons offered by Newspapers First for hiring Malloy over him wore pretextual, and furthermore failed to demonstrate that he was the victim of discrimination based on his age. Nevertheless, we address the insufficiency of the prima facie case. In so doing, it is of little consequence which statement of the requirements for a prima facie case we select as the framework for our analysis, since Isenbergh failed to make out a prima facie case under any of the formulations utilized by this circuit.

Were we to utilize the *McDonnell Douglas* paradigm, Isenbergh's prima facie case would fail on the fourth prong. While it is clear that he is a member of the protected class, and that he was rejected for the managerial job, it is less clear that he was qualified for the position; [11] however, assuming that he

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[11] Clearly Isenbergh was qualified for a position as a sales person. His qualifications as a manager were more dubious. Robert Govin testified that Isenbergh's managerial duties were limited to participating in occasional conference calls and generating a monthly report. It is questionable whether such experience at KRNS rendered him qualified to manage a regional office of Newspapers First that would be responsible for more than twice the number of major market newspapers than Isenbergh was used to dealing with at KRNS. Clearly enhanced managerial skills would be necessary, and it is not at all apparent that Isenbergh possessed skills sufficient to handle the new position. While evidence was offered to demonstrate Isenbergh's sales acumen, no evidence was offered which might vouch for his managerial skills. Thus, it is the conclusion of this court that Isenbergh failed to carry his burden

was, once Isenbergh was rejected, the job no longer remained open and Newspapers First did not continue to seek applicants from a less qualified pool of candidates. Ultimately a candidate possessing more qualifications for the managerial position was selected. It was unchallenged at trial that Larry Malloy had experience running an office consisting of many more people than Isenbergh was accustomed to supervising. It was also unchallenged that both Larry Malloy and Paul Isenbergh enjoyed fine reputations in the advertising business. While Isenbergh testified that he felt he had come across as enthusiastic, both of his interviewers testified that they found Larry Malloy to be more so, citing specific examples of how they came to their conclusion. Isenbergh offered absolutely no evidence that after he was rejected for the position Newspapers First continued to seek applicants from a less qualified pool of applicants. [12]

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of proving himself qualified for the position of manager of Newspapers First's Miami Office.

[12] Even if we were to adopt the Fourth Circuit's modification of the fourth prong of *McDonnell Douglas* for failure to hire cases, *Autry v. North Carolina Department of Human Resources*, 820 F.2d 1384 (4th Cir. 1987), Isenbergh would still not be able to make out a prima facie case. The modified fourth prong requires proof of a causal connection between the protected characteristic and the negative employment action taken. Isenbergh failed to prove that he was not selected for the job because of his age. Demonstrating that he was in the protected class and not selected is not enough to make out a prima facie case under *Autry*.

If we adhered strictly to the formulation set out in Alphin and Earley, Isenbergh's prima facie case would fail because he did not present any evidence to satisfy the third prong, i.e., he produced no evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in choosing Malloy over Isenbergh. Although he later complained of having received an unsatisfactory interview, the record contained undisputed evidence that immediately following Isenbergh's return from New York he felt the interview had gone well. There is also undisputed evidence that at least one person older than Isenbergh, Mr. Watkins, was ranked higher than him in consideration for the job. The evidence most favorable to Isenbergh's case was the confusion as to how the selection criteria were arrived at as well as what the source of the decision to use alternation ranking as an evaluative tool was. However even this is not sufficient to make the plaintiff's case. At best one could infer from the discrepancies in the testimony of the defendant's employees that Newspapers First was using the selection guidelines to hide an ulterior motive in choosing Malloy over Isenbergh. This is not sufficient to make out a prima facie age discrimination case. As the Eleventh Circuit has made clear, "the employer may [take negative employment action against] an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984). There was no evidence to support the inference that the criteria were a post hoc justification for age discrimination.

While "departures from well established guidelines are indicative of attempts to conceal a discriminatory motive through the use of ad hoc criteria which allow the defendant to cloak a discriminatory intent in ostensibly neutral rationales," *Brown v. American Honda Motor Co.*, 939 F.2d 946, 951 (11th

Cir. 1991), there was insufficient evidence presented to conclude that the defendant departed from well established guidelines when it chose to use alternation ranking or when it established the factors to consider in ranking the candidates. The evidence demonstrated that there was no well established guideline from which to depart. Formulating some sort of objective criteria against which to evaluate employees when none previously existed can hardly be said to be departing from established guidelines so as to mask discriminatory intent. Additionally, there was nothing in the memorandum prepared by Termotto that suggested the criteria in the memo were to be strictly adhered to in making the decisions. The guidelines were merely suggestions to assist Kosanke and Anthony in making intelligent decisions about MMTM's future management team. Likewise, the fact that alternation ranking system had not previously been utilized to any significant degree is not sufficient to give rise to an inference of discriminatory intent. While a departure from established procedures is to be viewed with suspicion, it do s not automatically give rise to an inference of discrimination. *Id* at 952.

Isenbergh also urges that a reasonable inference of discrimination might be drawn from the fact, if taken unrebutted, that his interview was shorter than the hour it was disregard for Isenbergh. There was absolutely no proof offered of a causal relationship between Isenbergh's age and the indifference he experienced during his interview.

Plaintiff also suggests that the inclusion of potential for long term advancement among the criteria to be considered in hiring managers is age discriminatory. We are not the first court to conclude that factoring the potential for long term advancement into an employment decision does not render the selection process per se discriminatory. In *Priest v. Daimler-Benz*, 35 Empl. Prac. Dec. P 34,181 (N.D. Ala.

January 9, 1984), 1984 W.L. 941, the court stated that the inclusion of such a factor in employment criteria does not "automatically raise the spectre of discrimination." *Id.* The *Priest* case was remarkably similar to the case at bar in many ways. It involved a plaintiff who had been a manager in a company which merged with another company, only to discover that as a result of the merger, there would be fewer managers in the new entity than there had been between the two merging companies. Just as in our case, the plaintiff was outranked by another employee and eventually sued alleging violations of the A.D.E.A. The court discussed whether the plaintiff had succeeded in making out a prima facie case of discrimination, spending considerable time on the prong requiring the production of evidence which provides a basis for an inference that age was a factor in the employment decision. The plaintiff offered evidence that he was referred to during the evaluation process as an "old pro". He also challenged the long term potential criteria. The court granted summary judgment to the defendant holding that no reasonable inference could be drawn which would support the plaintiff's contention that he had been the victim of age discrimination. Likewise, Isenbergh has presented no evidence from which the reasonable inference of discrimination may be drawn. As the Priest court concluded, "in essence, plaintiff was not retained because he was not ranked as high as others during the evaluation process. He was listed as an alternate, but the first choice took the position. There is no evidence that the evaluation process was undertaken in bad faith or that age was a factor to be deliberately considered in the evaluation process." [13] *Id.*

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[13] The failure of the plaintiff to demonstrate pretext will be addressed shortly.

Isenbergh also attempted to make much of the fact that during his interview he was not specifically questioned regarding his experience and understanding of local territory or his potential for long term advancement even though these were two of the factors to be considered in making the determination. It is inconsistent for plaintiff to argue simultaneously that the criteria create an age bias and also that the failure to inquire along those lines is discriminatory. Nonetheless, we address his concerns. The mere fact that no specific question was addressed to long term potential or local expertise does not give rise to an inference of discrimination. No one suggested the guidelines prepared by Termotto were to be interpreted in a rigid or formalistic manner. The existence of the skills and abilities they were designed to decipher could be gleaned from questioning that was not directed specifically at any one criterion. If the plaintiff was attempting to demonstrate the type of variance from set procedure as discussed in *Brown v. American Honda Motor Co., supra*, surely he did not succeed because the failure to inquire of the plaintiff verbatim from the guidelines can hardly be said to lead to a viable inference that discrimination occurred.

This failure by the plaintiff to offer evidence from which one could reasonably infer discrimination necessitates the defendant's motion be granted under *Pace v. Southern Ry. System,* 701 F.2d 1383 (11th Cir.), cert. denied, 464 U.S. 1018, 78 L. Ed. 2d 724, 104 S. Ct. 549 (1983) as well. Moreover, such a result is also mandated by the Supreme Court's holding in *Hicks*, since the plaintiff has failed to carry its burden of proof by neglecting to offer any evidence from which one could reasonably infer he was the victim of discrimination based upon his age.

If we were guided by the prima facie standard set forth in *Carter*, Isenbergh might be able to survive a motion directed

at the failure of the prima facie case. The only element about which there would be a question would be his qualifications for the managerial position. As indicated above, even if it were determined that Isenbergh were qualified, [14] and thus his prima facie case is achieved, the defendant's motion would be granted because Isenbergh clearly failed to demonstrate the defendant's offered reasons for hiring Malloy over Isenbergh were pretextual.

Newspapers First offered Isenbergh's low ranking as the reason for its decision to hire Malloy. Isenbergh challenges the entire alternation ranking system as a sham, but offers no evidence to support his allegations. Moreover, he allowed to go unchallenged the reasons offered by Newspapers First that accounted for the low ranking. Among the reasons were his renegade management style and his limited managerial experience. While there was clearly evidence in the record attesting to Isenbergh's skill as a salesman, particularly in securing the Disney account, there was also evidence that he was an uncooperative manager concerned more with his own personal gain than with the betterment of the company. The defendant through the testimony of Kosanke and Anthony offered Malloy's superior qualifications and enthusiasm as legitimate nondiscriminatory reasons for its decision to hire Malloy instead of Isenbergh. As a result, the presumption of discrimination which arose upon the establishment of the prima facie case is eliminated from consideration, and Isenbergh must

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[14] Clearly Isenbergh presented sufficient evidence to prove his qualifications as a salesperson, but the issue to be determined in evaluating his discrimination claim is his ability to serve as a manager. This court remains unconvinced that the plaintiff carried the burden of demonstrating himself qualified to work as the manager of Newspapers First's Miami office.

have come forward with sufficient evidence to satisfy the ultimate burden of proving discrimination if the verdict is to stand. *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (affirming the District Court's grant of judgment notwithstanding the verdict for failure to demonstrate pretext.)

In order for Isenbergh to overcome the motion for judgment n.o.v. after the defendant has offered a legitimate, nondiscriminatory reason for its action, he must establish pretext by demonstrating the employer's justification was unworthy of belief and that the employer's action was more than likely motivated by age discrimination. *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988). Isenbergh offered no evidence from which one could conclude that the reasons given for hiring Malloy instead of him were unworthy of belief. Although he claims he was enthusiastic, he did not challenge the determination that Malloy was more enthusiastic. Although he discussed his management skills, he did not challenge the fact that Malloy had managed more people and catered to more major market papers. He also did not challenge that Malloy was responsible for managing a larger office staff. In short, there was no evidence that the defendant offered a reason unworthy of belief for its decision.

As discussed above in conjunction with the prima facie case analysis, Isenbergh also failed to prove he was discriminated against. The record is devoid of any evidence that might show the reasons given for hiring Malloy were pretextual. There was no evidence that the selection process was undertaken in bad faith. The mere fact that Isenbergh disagreed with the decision made by Kosanke and Anthony does not give rise to an inference of discrimination. "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional

discrimination where [the defendant] has offered such extensive evidence of legitimate, nondiscriminatory reasons for its actions." *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987) (citations omitted). The defendant has clearly overwhelmed the plaintiff's proof by its credible and legitimate justification for the decision to hire Malloy.

Isenbergh offered evidence that the ranking system had not been used before and that the criteria which were to be used in conjunction with the ranking system were devised in an imprecise manner. Clearly one inference the plaintiff would like to draw is that the selection process as it was presented by the defendant was formulated after the decision to hire Malloy was made in an effort to justify its decision by some objective measurement. Even if such an inference were supported by the evidence, which it is not, the evidence regarding the relative qualifications of the two men would be sufficient to preclude the further inference of pretext or discrimination. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). Moreover, the fact that Kosanke and Anthony were both members of the protected class makes a finding of discrimination all the more unlikely. Kosanke was the same age as Isenbergh, and Anthony was fifty-five at the time the ranking took place. When considered along with all the other evidence in the case, this makes an inference that the ranking procedure was utilized to mask a discriminatory motive all the more unreasonable.

The fact that Isenbergh received the praise and accolades of his superiors at KRNS does not help him in establishing pretext. Proof of Isenbergh's skills as a salesman does not negate Malloy's superior skills as a manager. Moreover, the absence of any formal record of criticisms of Isenbergh's management abilities does not necessarily support

a finding of pretext. See, *Carter v. City of Miami*, 870 F.2d 578, 584 (11th Cir. 1989).

When a district court finds that there is not sufficient evidence from which a jury can conclude that the reasons articulated by the defendant were merely a pretext for discrimination, or that the defendant was more than likely motivated by a discriminatory motive, it must enter judgment for the defendant, notwithstanding a jury verdict to the contrary. Id. This court has carefully considered the record and concludes that the jury empaneled for this case engaged in surmise and conjecture in coming to its verdict rather than basing its verdict on the evidence in the case.

In making this determination we are guided in part by *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) where the Eleventh Circuit reversed the district court for failing to grant judgment notwithstanding the verdict where the plaintiff had failed to establish pretext. In *Elrod*, Sears claimed it fired the plaintiff due to allegations of sexual harassment levelled against him, but the plaintiff alleged his termination was motivated by his age. Elrod spent a great deal of energy at trial attempting to prove himself innocent of the charges, but his efforts were fruitless. The Eleventh Circuit pointed out the plaintiff's innocence of the sexual harassment charges was immaterial to the determination of the ADEA case. The essence of the discrimination claim was whether or not the defendant believed the allegations to be true, not whether they were in fact true. The court pointed out:

> Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA

> does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

Id. at 1470. Since "Elrod had offered no evidence to show that Sears' justification [was] unworthy of credence," *id.* at 1470, judgment was entered in favor of the defendant, notwithstanding the jury verdict in favor of the plaintiff.

In the matter presently before this court there is likewise no evidence to show that Newspapers First's justification for its decision to hire Malloy instead of Isenbergh was unworthy of credence. Moreover, the evidence certainly did not establish that discrimination was the real reason for the action Newspapers First took in hiring Malloy over Isenbergh. Perhaps the defendant's decision that Malloy was better qualified for the job than Isenbergh was incorrect. Even if that were so, the Eleventh Circuit dictates that no relief flows to the plaintiff where, as here, there was no evidence to prove that the defendant did not actually believe Malloy was more qualified for the position. Nothing more than a scintilla of evidence supports Isenbergh's contention that he was the victim of discrimination. This does not stand in the way of granting judgment pursuant to Fed. R. Civ. P. 50 (b).

Conclusion

For the reasons expressed herein, judgment for the defendant Newspapers First is GRANTED notwithstanding the jury verdict pursuant to Fed. R. Civ. P. 50 (b).

SO ORDERED.

Jacob Mishler, U.S.D.J.

Dated: June 22, 1994

Supreme Court, U.S.
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JUN 2 1997
CLERK

No. 96-1687

In the Supreme Court of the United States

OCTOBER TERM, 1996

PAUL N. ISENBERGH, JR., AND
ERIC E. ISENBERGH, AS CO-PERSONAL REPRESENTATIVES
OF THE ESTATE OF PAUL ISENBERGH,

Petitioners,

v.

KNIGHT-RIDDER NEWSPAPER SALES, INC., N/K/A
NEWSPAPERS FIRST, INC., AND KNIGHT-RIDDER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Did the court of appeals err in finding in this age discrimination case that there was an insufficient factual basis to conclude that the defendants' rationale for not hiring the plaintiff was pretextual?

RULE 29.6 STATEMENT

Respondent Knight-Ridder Newspaper Sales, Inc. is a wholly owned subsidiary of respondent Knight-Ridder, Inc. Knight-Ridder, Inc. indirectly owns approximately 50% of the shares of Newspapers First, Inc. and also has the following non-wholly owned subsidiaries and affiliates:

Destination Florida L.L.C.
News Holdings Corp.
Interealty Corp.
New Century Network, LLC
Detroit Newspaper Agency
Knight-Ridder Tribune Information Services
Southern Lights, L.L.C.
Infinet Company
Zip-2 Corp.
TKR Cable Partners
TKR Cable Company
KRC/CCC Investment Partnership
Fort Wayne Newspapers, Inc.
Fort Wayne Newspapers Agency
Infomart/Dialog Ltd. (Canada)
Teltech Resource Network Corporation
Personal Library Software, Inc.
Individual, Inc.
Frost & Sullivan
The Uncover Company
RWE Australian Business News Pty. Limited
Southeast Paper Manufacturing Co.
Ponderay Newsprint Company
Seattle Times Company
Netscape Communications Corporation
U.S. Order, Inc.
Intellimatch, Inc.
D.E.T. Card, L.C. (Gusto Marketing Services)
D.E.T. Finance, L.C.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The petition in this case has been filed by two individuals who are strangers to the litigation. They declare in a footnote to the petition that they are the "co-personal representatives of [the] estate" of "the plaintiff in this action" (Pet. 1-2 n.1). In fact, the plaintiff died over one year ago, while the case was pending in the court of appeals — yet no motion to substitute parties was ever filed under Fed. R. App. P. 43(a). In fact, the court of appeals issued its two opinions in this case without knowing that the plaintiff-appellant had died.

Under the Federal Rules of Appellate Procedure and the Rules of this Court, petitioners cannot now make themselves parties to the case over a year late by simply declaring in a certiorari petition that they are the representatives of the plaintiff's estate. The petition should be denied on this ground alone without regard to the merits of the question presented.

Moreover, even if petitioners were proper parties to the case, the petition raises an entirely factbound issue that plainly does not merit review by this Court. The holding of the court of appeals below is expressly limited to the finding, based on the court's "examination of the record," that the plaintiff, in pursing his claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), "failed in creating an issue of *fact* about the dis-believability of the [respondents'] reason for the[ir] * * * decision" not to hire him (Pet. App. 16a (emphasis added)). Thus, no certworthy issue is presented by the petition — indeed, no *legal* issue at all is raised — and review should therefore be denied on this ground as well.

STATEMENT

1. The plaintiff in this case, Paul Isenbergh, worked for respondent Knight-Ridder Newspaper Sales, Inc. ("Knight-Ridder") "from the late 1960s until 1990, mostly as a salesman" (Pet. App. 2a-3a). In 1990, Knight-Ridder merged with Million Market Newspapers/Times Mirror National Marketing, Inc. ("Million Market") to form Newspapers First, Inc. At the time of the merger, Isenbergh was 60 years old and the manager of

Knight-Ridder's Miami sales office. Million Market also had a Miami sales office, which was managed by Larry Malloy, who was 44 years old (*id.* at 2a). The newly formed Newspapers First, however, needed only one office in Miami and one manager of that office (*ibid.*).

Isenbergh and Malloy competed for the position of Miami office manager along with eight other Knight-Ridder and Million Market "managers from around the country" (Pet. App. 2a). Two senior officers of Newspapers First — King Anthony, the former president of Million Market and current president of Newspapers First, and John Kosanke, the former president of Knight-Ridder and current executive vice-president of Newspapers First — interviewed the ten candidates (*ibid.*).[1]

After the interviews, Anthony and Kosanke ranked the candidates using an "alternation ranking system" (Pet. App. 3a). Under that system, "each candidate received two ordinal rankings: one based on past management performance and one based on the interview. The two rankings were averaged to obtain each candidate's overall score" (*ibid.*).

Isenbergh was ranked eighth and Malloy second under the "alternation ranking system" (Pet. App. 3a). "Three managers over age fifty — including one who was sixty-three years old — finished higher than Isenbergh" (*ibid.*). Based on these rankings, Malloy was hired as the Miami office manager and "Isenbergh was offered the chance to interview for a sales position in Miami. He chose to take early retirement instead" (*ibid.*).

2. Isenbergh then brought suit in the Southern District of Florida under the ADEA (Pet. App. 37a), alleging that

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[1] "The only real competition for the new position [of Miami office manager] * * * was apparently between Isenbergh and Malloy, because Newspapers First did not want to move a manager from another part of the country to Miami" (Pet. App. 2a-3a).

respondents "discriminated against him because of his age in selecting the manager for the * * * Miami sales office" (*id.* at 2a). The case was tried to a jury (*id.* at 38a).

To support his ADEA claim, Isenbergh relied on the following facts: he was promoted to be a vice-president of Knight-Ridder in 1984 (Pet. 5; Pet. App. 3a); he sold a major "advertising package to Walt Disney World" in 1986, which Malloy had also competed to sell on behalf of Million Market (*ibid.*; Pet. 5); he received regular annual pay increases and bonuses (*ibid.*; Pet. App. 4a); he successfully managed the five-person Knight-Ridder Miami sales office (*ibid.*; Pet. 6); Kosanke testified that Isenbergh "was a 'seasoned manager' and a 'satisfactory manager'" and there was no "paper trail of criticism" of his job performance (Pet. App. 4a); and the "alternation ranking system" had never been used to make hiring decisions at Knight-Ridder (*id.* at 57a, 63a; Pet. 6-9). In addition, Isenbergh testified that "the atmosphere at his interview [with Kosanke and Anthony] was 'cold' and that Anthony was on the phone most of the time. His interview allegedly lasted only a half-hour, whereas Malloy's was a full hour" (Pet. App. 3a). Based on these facts, Isenbergh alleged that respondents "discriminated against him because of his age" in hiring Malloy instead of him (*id.* at 2a).

In their defense, respondents introduced undisputed evidence showing that Malloy had "more extensive management experience" than Isenbergh (Pet. App. 4a). Malloy had previously "managed a staff of thirty-four sales people and seven clerical workers" (*id.* at 48a). In contrast, Isenbergh had managed no more than five people during his career at Knight-Ridder (*ibid.*). Moreover, "Isenbergh's duties were principally sales related" (*ibid.*). Indeed, the one accomplishment in his lengthy career at Knight-Ridder that he stressed was his *sale* of an advertising package to Walt Disney World (*id.* at 3a-4a). And even his limited role as a manager was criticized by Kosanke, who testified "that Isenbergh was a 'lone ranger' and was not a 'team player'" (*id.* at 4a). Respondents therefore

asserted, based on these facts, that they had hired Malloy rather than Isenbergh because Malloy was the "better-qualified" *manager*, as reflected in the rankings established by the "alternation ranking system" (Pet. App. 18a).

At the conclusion of the case, the jury returned a verdict for Isenbergh, awarding him $250,000 in damages. Respondents moved for judgment as a matter of law under Fed. R. Civ. P. 50(b), which the district court granted (Pet. App. 36a-38a).

In a lengthy opinion (Pet. App. 36a-66a) explaining its decision to grant respondents' motion, the district court carefully analyzed the evidence presented at trial. The court concluded that, even if the plaintiff had established a prima facie case of discrimination under the framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), which it seriously doubted (Pet. App. 55a ("Isenbergh failed to make out a prima facie case under any of the formulations utilized by this circuit")), he could not prevail because he had "failed to prove that the reasons offered by [respondents] for hiring Malloy over him were pretextual, and furthermore failed to demonstrate that he was the victim of discrimination based on his age" (*ibid.*).[2]

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[2] Isenbergh challenged respondents' proffered rationale for not hiring him by attacking the "alternation ranking system." The district court rejected his arguments (Pet. App. 61a):

> [Respondents] offered Isenbergh's low ranking as the reason for [their] decision to hire Malloy. Isenbergh challenges the entire alternation ranking system as a sham, but offers no evidence to support his allegations. Moreover, he allowed to go unchallenged the reasons offered by [respondents] that accounted for the low ranking. Among the reasons were his renegade management style and his limited managerial experience. While there was clearly evidence in the record attesting to Isenbergh's skill as a salesman, particularly in securing

3. Isenbergh appealed to the Eleventh Circuit (Pet. App. 21a). Before the court decided the case, however, Isenbergh died on March 1, 1996. *Miami Herald*, March 4, 1996, at B4. No motion was ever filed with the court of appeals under Fed. R. App. P. 43 (a) for substitution of a party to succeed Isenbergh.

4. In an opinion dated June 11, 1996, the Eleventh Circuit affirmed (Pet. App. 20a-35a).[3] It held that the plaintiff had established a prima facie case of age discrimination (*id.* at 32a-33a). The court found that Isenbergh was "at least at some level qualified" to be the Miami office manager, that he "was in the protected age group, and he was adversely affected by [respondents'] decision to select Malloy, who is sixteen years younger than Isenbergh, as the new manager," and that "[t]he circumstances surrounding the merger of the two companies and the way in which Malloy was selected for the new position suggest that the newly formed company might have wanted to avoid hiring employees of Isenbergh's age" (*ibid.*).

The court next held that respondents had produced evidence of "a legitimate, nondiscriminatory reason for offering the job to Malloy rather than Isenbergh": Malloy had superior "management ability" (Pet. App. 33a). As to this rationale for hiring Malloy, however, the court found that it "would not have been mere speculation for the jury to disbelieve" respondents'

> the Disney account, there was also evidence that he was an uncooperative manager concerned more with his own personal gain than with the betterment of the company. [Respondents] through the testimony of Kosanke and Anthony offered Malloy's superior qualifications and enthusiasm as legitimate nondiscriminatory reasons for [their] decision to hire Malloy instead of Isenbergh.

[3] The court later withdrew its June 11, 1996, opinion and substituted a revised opinion that also affirmed the district court. See pages 7-8, *infra*.

"explanation of the selection process" (*id.* at 34a; see Pet. 8-9). The court nonetheless held that there was "no evidence * * * that the real selection process used age as a criterion" (Pet. App. 34a).

Among other facts supporting its holding, the court noted that a "sixty-three-year-old candidate was rated more highly than Isenbergh overall, and more highly than both Malloy and Isenbergh in terms of managerial skills" (*id.* at 34a-35a). The court concluded (*id.* at 35a):

> Most likely, Kosanke and Anthony chose Malloy because they liked the way he had performed in the past. The alternation ranking system may have been a smoke screen hiding the fact that [respondents] held Malloy in higher regard than Isenbergh, but there is no evidence from which a reasonable jury could reasonably believe that it was a smoke screen hiding the fact that Malloy was hired because of his relative youth.

5. Although Isenbergh was deceased, a suggestion of rehearing en banc was filed on his behalf, supported by an *amicus curiae* brief filed by the U.S. Equal Employment Opportunity Commission ("EEOC"), arguing that the panel had misapplied this Court's decision in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), and circuit precedent, *Howard* v. *BP Oil Co.*, 32 F.3d 520 (11th Cir. 1994); *Hairston* v. *Gainsville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994). According to Isenbergh, these precedents hold that "'the fact finder's rejection of defendant's proffered reasons is sufficient circumstantial evidence upon which to base a judgment for the plaintiff.'" Suggestion of Rehearing En Banc at 13 (quoting *Howard*, 32 F.3d at 527). Because the panel had concluded that respondents "may not have been completely truthful" in their explanation of their decision to hire Malloy (Pet. App. 34a), Isenbergh argued that the panel erred in finding there was insufficient evidence to support the jury verdict in his favor. Suggestion of Rehearing En Banc at 13-15.

6. The court of appeals denied rehearing, but the panel "withdr[e]w altogether" its prior opinion and substituted a new opinion on September 19, 1996 (Pet. App. 1a-2a). In its new opinion, the panel again concluded that Isenbergh had established a prima facie case (*id.* at 7a) and that respondents had met their "burden of producing evidence of a legitimate, nondiscriminatory reason for offering the job to Malloy" by asserting their conclusion that Isenbergh was "less qualified" (*id.* at 8a).

The court then held that Isenbergh had failed to raise an issue of fact to challenge respondents' rationale for hiring Malloy, observing (Pet. App. 18a (emphasis in original)) that respondents:

> presented the jury with evidence to show that Malloy, Isenbergh's competitor, managed a larger office; that Isenbergh had difficulties agreeing to office budgets; that Malloy was perceived by the decisionmakers as more of a team player; that Malloy was near the top of the rankings under the alternation ranking system, while Isenbergh ranked second-to-last; and that Malloy had dealt with a larger number of major market newspapers than had Isenbergh. Also, the evidence showed that the favorable past ratings Isenbergh pointed to related to Isenbergh's *sales*, not *managerial*, experience.

In light of this "overwhelming evidence," the court concluded that Isenbergh had failed to raise a triable issue of fact on whether respondents' justification for hiring Malloy was pretextual (*ibid.*).

In the course of its second opinion, the court engaged in an extended legal analysis of the question "whether a plaintiff in Isenbergh's position carries his burden of proof on discrimination just by showing a basis in the record for disbelief of the employer's reason" (Pet. App. 9a). On this legal issue, the court noted "some conflict in the case law of this circuit" (*ibid.*), focusing its attention on the decision in *Howard*, *supra*. The

court's entire discussion, however, was explicitly dictum (Pet. App. 16a (footnote omitted)):

> Having noted the ostensible conflict in the circuit's law and having had our say about it, we return to the case before us now. Whatever significance *Howard* might have, *Howard* does not control this case because our examination of the record here indicates that Isenbergh failed in creating an issue of fact about the dis-believability of the employer's reason for the hiring decision.

The court therefore affirmed the district court's judgment as a matter of law for respondents.[4]

REASONS FOR DENYING THE PETITION

1. The two individuals who have filed the petition seeking review of the court of appeals' decision, Paul N. Isenbergh, Jr., and Eric E. Isenbergh, are not and never have been parties to the case. The plaintiff in this litigation, Paul Isenbergh, died over one year ago — months before the court of appeals issued its first opinion in the case. Petitioners made no effort to substitute themselves as parties for the deceased, even though Fed. R. App. P. 43(a) expressly provides for the substitution of parties in this situation:

> **(a) Death of a Party.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. * * *

Although Rule 43(a) does not specify any time deadline within which a substitution motion must be filed, the courts of appeals

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[4] A suggestion of rehearing en banc was filed on Isenbergh's behalf following the panel's second opinion. This petition was not supported by the EEOC. The court again denied rehearing.

have authority to dismiss an appeal when no timely motion is filed. See *Gamble* v. *Thomas*, 655 F.2d 568, 569 (5th Cir. 1981); *Crowder* v. *Housing Auth. of the City of Atlanta*, 908 F.2d 843, 846 n.1 (11th Cir. 1990); Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3989 (1996).

This Court's Rule 35.1 provides that "[i]f a party dies after filing a petition for a writ of certiorari to this Court, * * * the authorized representative of the deceased party may appear and, on motion, be substituted as a party." The substitution, however, must be made "within six months after the death of the party, [or] the case shall abate" (*ibid.*).

Petitioners are not parties to this case because they have not filed a motion to be substituted as parties either in the court of appeals under Fed. R. App. P. 43(a) or in this Court under S. Ct. Rule 35.1. Any motion filed by petitioners now — fourteen months after the death of the plaintiff — would be untimely.[5] The result is that, as non-parties, petitioners cannot invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) by filing a petition for a writ of certiorari. Only a "party" may file a certiorari petition under § 1254(1).

Furthermore, even if petitioners were allowed to file an untimely Rule 43(a) motion to substitute themselves as parties, the time for filing a certiorari petition has long ago lapsed, and any petition filed by them would be jurisdictionally out of time. See 28 U.S.C. § 2101(c).

The petition in this case filed by two non-parties should therefore be denied.

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[5] Moreover, petitioners could not file a substitution motion under S. Ct. Rule 35.1 because the rule authorizes such a motion only in the event of a petitioner's death *after* a certiorari petition is filed. The petition filed by petitioners as non-parties is a nullity (see 28 U.S.C. § 1254(1)), and the defect cannot be cured under the terms of the rule.

2. Even if petitioners were proper parties and had filed a timely certiorari petition, the factbound question they seek to raise is manifestly inappropriate for review by this Court. The holding of the court of appeals is expressly limited to the finding, based on the court's "examination of the record" in this particular case, that Isenbergh "failed in creating an issue of fact about the dis-believability of the employer's reason for the hiring decision" at issue (Pet. App. 16a).

a. Although the court "had [its] say" about a legal issue (sometimes called the "pretext-plus" issue) that has arisen in a number of other cases — whether judgment as a matter of law may be entered in a case in which the plaintiff has established a prima facie case and has adduced sufficient evidence to allow a jury to disbelieve the employer's proffered explanation for its hiring decision but not to show specifically that the pretextual explanation masks an impermissibly discriminatory motive — the court explicitly did not decide the issue (Pet. App. 16a). That issue did "not control this case" (*ibid.*), because the plaintiff here failed to adduce sufficient evidence to allow the jury to find in the first place that respondents' explanation for its decision to hire Malloy was pretextual.

Thus, the court's discussion of this issue was "dicta," as petitioners themselves repeatedly concede (Pet. ii, 10, 13 n. 4), and the case presents only the very limited factbound question whether Isenbergh failed to create a triable issue of fact about respondents' hiring rationale.[6] In this connection, the circuits are

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[6] The Eleventh Circuit itself has recently described the panel's discussion of the "pretext-plus" issue in this case as mere "dicta." *Combs* v. *Plantation Patterns*, 106 F.3d 1519, 1532 (1997). The court in *Combs* reaffirmed what it viewed as longstanding circuit precedent holding that "once a plaintiff has established a prima facie case and has put on sufficient evidence to allow a factfinder to disbelieve an employer's proffered explanation for its actions, that alone is enough to preclude entry of judgment as

agreed that, whatever the case after a supportable finding of pretext is made, the finding of pretext must itself be supported by evidence on which a reasonable jury could base such a conclusion. See, *e.g.*, *Combs* v. *Plantation Patterns*, 106 F.3d 1519, 1538-1539 (11th Cir. 1997); *Sheridan* v. *E. I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d. Cir. 1996) (en banc), cert. pet. filed, No. 96-1231 (U.S. Feb. 3, 1997); *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120, 1124-1125 (7th Cir. 1994); *Washington* v. *Garrett*, 10 F.3d 1421, 1433-1434 (9th Cir. 1993). It is that noncontroversial requirement that Isenbergh does not satisfy. In short, no legal issue of any import — let alone a disputed legal issue of nationwide importance sufficient to justify review by this Court — has been raised in this case.

b. Having acknowledged that the legal discussion in the court of appeals' decision is "dicta," petitioners have effectively conceded that the case does not properly present any legal issue that is suitable for review by this Court. They do not and cannot cite a single precedent from any other circuit or any state court that conflicts with the decision in this case.

Instead, petitioners focus on the revision of the court of appeals' analysis in its second opinion and suggest that the court behaved improperly (Pet. 12):

> For judges, trial or appellate, to reweigh arguable evidence that has been evaluated reasonably by a jury, no matter how good those judges' intentions, violates a party's right to trial by jury. To do so in the way the appeals court panel did — i.e., in serial published opinions, one of which states that there is evidence to support a disbelief of the employer's explanation, but the second of which says that there is no such evidence — conjures up the specter of a results-oriented judiciary.

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a matter of law." 106 F.3d at 1532.

To "remedy [the] individual injustice" they "conjure" in this case and "to prevent its spread" (Pet. 14), petitioners invoke this Court's supervisory powers under S. Ct. Rule 10(a) as a basis for certiorari review (Pet. 13-14).

This suggestion is patently frivolous. In revising its opinion, the court of appeals did exactly what petitioners requested in their suggestion of rehearing en banc: reconsider its analysis. As a result of this reconsideration, the court decided to "withdraw altogether" its first opinion and to substitute a revised opinion that "better explain[s] our thoughts" (Pet. App. 1a-2a). The first opinion is no longer a precedent of the Eleventh Circuit, and subsequent references to it by parties in other cases have been rejected by courts in the circuit. See, *e.g.*, *Krist* v. *Gates Power Drive Prods., Inc.*, 952 F. Supp. 768, 771 n.3 (M.D. Ala. 1996) (correcting party's citation to withdrawn opinion and referring only to substituted opinion).

Moreover, the court of appeals' "better explanation" in its second opinion was not a radical departure from its first decision. In its first opinion, the court identified facts that cast "doubt" on respondents' proffered rationale for selecting Malloy (Pet. App. 34a). In its second opinion, the court went a step further, however, and concluded that, although there was "a basis on which to question some facts offered by [respondents] in support of [their] decision," the questionable character of those facts does not, "in view of [respondents'] overwhelming evidence, provide a basis for contradicting [respondents'] ultimate justification: Malloy was more qualified" (*id.* at 18a).[7]

This holding of the court of appeals is the sole issue raised in the case. Petitioners offer no plausible reason why the Court

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[7] This was also the holding of the district court, see pages 4-5, *supra*. This Court generally will not review "concurrent findings of fact by two courts below." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

should use its scarce resources to review this factbound, case-specific issue. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Review should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 96-1687

In the

Supreme Court of the United States

October Term, 1996

PAUL N. ISENBERGH, JR., and ERIC E. ISENBERGH,
as co-personal representatives of the
Estate of PAUL ISENBERGH

Petitioners,

vs.

KNIGHT-RIDDER NEWSPAPER SALES, INC., n/k/a
NEWSPAPERS FIRST, INC. and KNIGHT-RIDDER, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondents misapplied the laws governing substitution of parties in an effort to avoid review by this Court of a decision which is in direct contravention of the *Hicks/Burdine* paradigm.[1] Further, respondents' suggestion that the co-personal representatives of Paul Isenbergh, his sons, are not proper parties to this case is without merit.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. IN SUGGESTING THAT THE CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ISENBERGH ARE NOT PROPER PARTIES, RESPONDENTS MISAPPLIED THE APPELLATE AND SUPREME COURT RULES GOVERNING SUBSTITUTION UPON DEATH.

Petitioners are proper parties to this action because respondents failed to file a motion for substitution of party at the appellate level and the Supreme Court rules governing substitution of parties do not apply under these facts.

Paul Isenbergh, the original claimant, died after a notice of appeal was filed, but before the Court of Appeals for the Eleventh Circuit issued its first opinion on June 11, 1996. Although respondents were aware of appellant, Paul

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[1] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Isenbergh's death,[2] they never filed a motion for substitution of a party. *See* Fed. R. App. P. 43(a). Rule 43(a) does not mandate substitution of a party once death occurs. However, it does provide that "the personal representative of the deceased party *may* be substituted as a party on motion filed by the representative[3] or *by any party.*" Fed. R. App. P. 43(a)(emphasis added.)

The Supreme Court rules governing substitution of parties only applies if death occurs *after* a writ of certiorari is filed. *See* Sup. Ct. R. 35.1. Because Isenbergh died prior to filing a writ of certiorari, this rule does not apply. Respondents have conceded this fact in their Brief in Opposition. (Resp. 9, n.5). Thus, the six month limitation for substitution after death does not apply under these circumstances.

As to appellate rules governing substitution of a party upon death, the court of appeals does have the authority to dismiss an appeal if no substitution is made under certain conditions. First, a motion for substitution of a party or suggestion of death on the record must be made. *See* Fed. R. App. P. 43(a); *Gamble v. Thomas,* 655 F.2d 568 (5th Cir. 1981). Additionally, if injunctive relief were the only item at issue and no motion or suggestion were made, the court of

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[2] Respondent Knight-Ridder, Inc., is a newspaper publisher in one of whose papers, *The Miami Herald*, the obituary was published. *The Miami Herald*, March 4, 1996, B4.

[3] Unlike a representative of an actual party, "the attorney for the decedent has no authority to suggest the death of his or her client [the decedent] upon the record." *See Smith v. Planas,* 151 F.R.D. 547 (S.D.N.Y. 1993).

appeals might dismiss the action because dismissal would have no affect on the relief. *See Crowder v. Housing Authority*, 908 F.2d 843 (11th Cir. 1990).[4]

Another situation that can warrant dismissal is one in which no survivor or heir is interested in pursuing the appeal. The Court of Appeals for the Fifth Circuit dismissed an appeal on such grounds. *Gamble v. Thomas*, 655 F.2d 568 (5th Cir. 1981). In that case, the appellees suggested on the record, through a letter to the court, that the appellant died. *Gamble*, 655 F.2d at 568. The clerk's office wrote to various survivors of the decedent to determine if any survivor desired to pursue the appeal. *Id.* No response was received. *Id.* at 568-69. Although the court dismissed the action because of the lack of interest of the decedent's heirs, the court recognized that the rules do not contain an express provision requiring dismissal of the appeal. *Id.*

In the instant case, the survivors of the decedent desire to have this Court review the court of appeals' affirmation of the district court's decision to nullify a jury verdict: the trial judge, and then the appellate panel, chose to believe the employer's explanation even in the face of evidence that the appeals court stated in its initial, later-withdrawn opinion, created issues of fact. (Pet. App. 20a-35a). Petitioners, the personal representatives and sons of the decedent, are not seeking mooted injunctive relief, but rather, review of a $250,000 jury award in back pay for intentional age

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[4] In *Crowder*, the injunctive relief was pursued through the co-appellant who continued to pursue the appeal. 908 F.2d at 846, n.1.

discrimination that would belong to the estate.[5] Thus, the co-personal representatives have a direct interest and are proper parties to file the writ of certiorari.

If respondents wished to have the plaintiff/appellant's estate substituted as a party, they should have made their motion or suggestion of death at the appellate level, rather than attempting to bullet-proof an appeals court victory by first keeping silent and then trying to play "gotcha" when the personal representatives petition for certiorari. "If a party . . . desires to limit the time within which another may make the motion [for substitution], he may do so by suggesting the death on the record." *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969)(citing the committee notes for Fed. R. Civ. Pro. 25(a)[6])(emphasis omitted). Failing to have done that, respondents can not now seek dismissal of the writ on procedural grounds using Supreme Court Rules which are inapplicable. *See* Sup. Ct. R. 35.1.

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[5] Actions brought pursuant to the ADEA survive the claimant's death. *See Slade v. United States Postal Service,* 952 F.2d 357 (10th Cir. 1991)(stating claimant's Title VII action survived after the death of claimant). Because the legislative history of the ADEA only offers "general guidance," law applicable to Title VII cases is often used to analyze ADEA claims. *See Western Airlines, Inc. v. Criswell,* 472 U.S. 400 (1985)(interpreting an ADEA case based on authority from a Title VII action).

[6] Appellate Rule 43(a) is modeled after F.R.C.P. 25(a). Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3989 (1996).

The purpose of the rules governing substitution of parties upon death was not to dismiss otherwise meritorious claims. *Rende,* 415 F.2d at 986 (citing *Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 296 (2d Cir. 1966). This Court interprets these rules liberally, and with flexibility in permitting substitution. *Rende,* 415 F.2d at 986 (citing *Roscoe v. Roscoe,* 379 F.2d 94, 99 (1967). The appeals court judgment should be reviewed by this Court and certiorari should not be denied because the action is brought by the personal representatives of the original plaintiff/appellant.

CONCLUSION

Based on the authorities cited and the arguments presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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